Nos. 144, 145, 144, 145.

Motion for additional time.

Office Supreme Court
FILED
OCT 28 1901
JAMES H. McKENNEY, Clerk

Supreme Court of the United States.

~~Nos. 396, 397, 398, 399 and 400.~~

OCTOBER TERM, 1901.

Filed Oct. 28, 1901.

C. C. McCHORD, ET AL., - - - - - - *Appellants.*
vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY, *Appellee.*

C. C. McCHORD, ET AL., - - - - - - *Appellants.*
vs.
SOUTHERN RAILWAY COMPANY IN KENTUCKY, - *Appellee.*

C. C. McCHORD, ET AL., - - - - - - *Appellants.*
vs.
LOUISVILLE, HENDERSON & ST. LOUIS RAILWAY CO., *Appellee.*

C. C. McCHORD, ET AL., - - - - - - *Appellants.*
vs.
CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY CO., - - - - - - - *Appellee.*

C. C. McCHORD, ET AL., - - - - - - *Appellants.*
vs.
CHESAPEAKE & OHIO RAILWAY COMPANY, - *Appellee.*

The appellants and appellees unite in moving the court for an extension of time of one hour on each side to argue the above-styled cases. They involve the same questions, except that in the Louisville & Nashville Railroad Company case the question of contract is involved, which is not involved in the other cases.

JAMES P. HELM AND HELM BRUCE, for
Louisville & Nashville Railroad Company, and
Louisville Henderson & St. Louis Railway Company.

WALKER D. HINES, for
Louisville & Nashville Railroad Company.

A. P. HUMPHREY, for
Southern Railway Company in Kentucky.

EDWARD COLSTON, for
Cincinnati, New Orleans & Texas Pacific Railway Co.

W. H. WADSWORTH, for
Chesapeake & Ohio Railway Company.

DAVID W. BAIRD, for
Appellants.

Supreme Court of the United States.

Nos. 396, 397, 398, 399 and 400,

OCTOBER TERM, 1901.

C. C. McCHORD, ET AL., - - - - - *Appellants.*

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, *Appellee.*

C. C. McCHORD, ET AL., - - - - - *Appellants.*

vs.

SOUTHERN RAILWAY COMPANY IN KENTUCKY, - *Appellee.*

C. C. McCHORD, ET AL., - - - - - *Appellants.*

vs.

LOUISVILLE, HENDERSON & ST. LOUIS RAILWAY CO., *Appellee.*

C. C. McCHORD, ET AL., - - - - - *Appellants.*

vs.

CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY CO., - - - - - - *Appellee.*

C. C. McCHORD, ET AL., - - - - - *Appellants.*

vs.

CHESAPEAKE & OHIO RAILWAY COMPANY, - *Appellee.*

SUGGESTIONS ON MOTION TO EXTEND TIME.

When these cases were argued before, upon hearing of the motion to extend the time, the court granted an extension and allowed one hour extra to each side to argue. The motion before was to allow the same time for the five above-styled cases as is usually allowed for three cases, but the court, after considering it, gave an extension of only one hour to the side. The proper solution of these questions is of great importance to the parties, and it is difficult to see how they can be properly presented in less time than the court allowed on the other argument. There is a separate and distinct question in the Louisville & Nashville Railroad Company case, that company claiming it has a contract right to

fix its own tolls within the limits prescribed by an irrepealable charter. This question is of extreme importance to the company, and one requiring a careful examination of the particular terms of the acts of the legislature granting and amending the charter of the Louisville & Nashville Railroad Company. Respectfully submitted.

JAMES P. HELM AND HELM BRUCE, for
Louisville & Nashville Railroad Company, and
Louisville Henderson & St. Louis Railway Company.

WALKER D. HINES, for
Louisville & Nashville Railroad Company.

A. P. HUMPHREY, for
Southern Railway Company in Kentucky.

EDWARD COLSTON, for
Cincinnati, New Orleans & Texas Pacific Railway Co.

W. H. WADSWORTH, for
Chesapeake & Ohio Railway Company.

DAVID W. BAIRD, for
Appellants.

1141 to 1145

Nos. 396-400

396-400.

Office Supreme Court
FILED
DEC 31 1900
JAMES H. McKENNEY

Def.s McQuown, Kohn & Baird

SUPREME COURT OF THE UNITED STATES.

Filed Dec. 31, 1900.

Charles C. McChord, et al., - - - Appellants,

VERSUS

Louisville & Nashville Railroad Company, - Appellees.

AND FOUR OTHER CASES HEARD THEREWITH.

BRIEF FOR APPELLANTS.

ROBERT J. BRECKINRIDGE,
Attorney General of Kentucky.
LEWIS McQUOWN,
AARON KOHN,
ZACK PHELPS,
DAVID W. BAIRD,
Counsel for Appellants.

COURIER-JOURNAL JOB PRINTING CO., LOUISVILLE.

INDEX.

PAGE.

STATEMENT 1

STATUTE QUESTIONED 2

ERRORS ASSIGNED 7

ARGUMENT 9

I. JURISDICTION 10

Of equity is moved only by property rights . . . 11

Taylor v. Beckham, 178 U. S. 548, 610;
Ex parte Sawyer, 124 U. S. 200.

A suit against a state officer to enjoin the execution of a state law, when he is not specifically charged with the execution thereof other than by virtue of a general duty, is a suit against the state . . . 14

Fitts v. McGhee, 172 U. S. 516;
In re Ayres, 123 U. S. 443, 485, 496, 500, 505.

The making of a rate is a legislative function . . . 19

Interst. Com. Com. v. R. R., 167 U. S. 494, 501, 505, 509;
Interst. Com. Com. v. R. R., 168 U. S. 144;
R. R. v. Wellman, 143 U. S. 339;
R. R. v. Minnesota, 134 U. S. 418;
Stone v. Trust Company, 116 U. S. 307;
Reagan v. Trust Co., 154 U. S. 362;
Smyth v. Ames, 169 U. S. 466.

There is no distinction between the exercise of the function directly by the legislature or mediately through a commission 21

Covington Turnpike v. Sandford, 164 U. S. 580;
Smyth v. Ames, 169 U. S. 466;
Reagan v. Trust Co., 154 U. S. 362;
R. R. v. Gill, 156 U. S. 664;
R. R. v. Minnesota, 134 U. S. 418;

Budd v. New York, 143 U. S. 517;
Lake Shore v. Smith, 173 U. S. 684.
Injunction does not lie against the exercise of a legislative function 22
Cooley on Const. Limit. 55, 153;
State v. Hitchcock, 1 Kan. 178;
State v. Boone County, 50 Mo. 317;
Patterson v. Barlow, 60 Pa. St. 54;
Works on Courts and Their Juris. 183, 186;
U. S. v. Guthrie, 17 How. 284;
Brashaer v. Mason, 6 How. 92;
Decatur v. Pawling, 14 Peter 497;
Marbury v. Madison, 1 Cranch 137;
Mississippi v. Johnson, 4 Wall. 475.
Injunction does not lie against the making of a rate, or against a commission before the rate is made . 24
Stone v. Trust Co., 116 U. S. 307;
Spring Valley v. Schottler, 110 U. S. 347;
Lake Shore v. Smith, 173 U. S. 684;
Reagan v. Trust Co., 154 U. S. 367;
Smyth v. Ames, 169 U. S. 466;
Id. 171 U. S. 361;
Id. 64 Fed. 165;
Higginson v. Railroad, 100 Fed. 235;
Id. 102 Fed. 197;
R. R. v. Minnesota, 134 U. S. 418;
San Diego v. National City, 174 U. S. 739;
Williams v. Mississippi, 170 U. S. 213;
Trammel v. Dinsmore, 102 Fed. 800;
Southern Pac. Co. v. R. R. Com., 78 Fed. 236;
Southern Pac. Co. v. R. R. Com., 87 Fed. 21;
Western Union v. Myatt, 98 Fed. 335; and
State v. Johnson, 60 Pac. 1068,
The last two cases distinguished;
Tilley v. Railroad, 5 Fed. 658;
Storrs v. R. R., 29 Fla. 617; 11 S. R. 227;
R. R. v. Jones, 149 Ill. 378;
L. & N. v. R. R. Com., 19 Fed. 679,
The last case distinguished.

Demurrer does not confess that a reasonable rate can not be made 43
Smyth v. Ames, 169 U. S. 466;
Higginson v. R. R., 171 U. S. 361;
Reagan v. Trust Co., 154 U. S. 401.
II. Interstate Commerce 44
State statute relating to commerce is presumed to relate only to domestic commerce in absence of an expressed relation to interstate or foreign commerce 44
Munn v. Illinois, 94 Ill. 113;
Stone v. Trust Co., 116 U. S. 307;
Wabash R. R. v. Illinois, 118 U. S. 557;
R. R. v. Jones, 149 Ill. 384;
Endlich on Interp. of Stat., § 169.
This is but an exemplification of the general rule which presumes statutes to be constitutional . . 49
Smyth v. Ames, 169 U. S. 466;
Reagan v. Trust Co., 154 U. S. 362;
R. R. v. Smith, 173 U. S. 684;
Railroad v. Wellman, 143 U. S. 339;
Southern Pac. v. R. R. Com., 78 Fed. 236;
R. R. v. Tompkins, 176 U. S. 173.
The bills of complaint do not claim that there is no state commerce. That there is such is settled beyond question 51
R. R. v. Lander, 20 Ky. Law Rep. 913;
R. R. v. Mississippi, 133 U. S. 587;
R. R. v. Pennsylvania, 145 U. S. 192;
Tiedeman on State and Fed. Control, 1056;
Plassey v. Ferguson, 163 U. S. 537;
Stone v. Trust Co., 116 U. S. 307;
C. & O. R. R. v. Ky., decided by U. S. Sup. Ct. Dec. 1900.
That state and interstate commerce may be intermingled, and have a close relation one to the other, does not prevent the state from controlling

that which is state or domestic commerce . . . 52
Smyth v. Ames, 169 U. S. 466;
R. R. v. Tompkins, 176 U. S. 167;
Reagan v. Trust Co., 154 U. S. 362.
III. Judicial Power 53
A judicial hearing is not necessary to the fixing of a rate 53
R. R. v. Minnesota, 134 U. S. 418;
Fitts v. McGhee, 172 U. S. 516;
R. R. v. Nebraska, 170 U. S. 57;
State v. R. R., 33 Kan. 176;
N. Y. Health Dept. v. Trinity Church, 145 N. Y. 32;
San Diego v. Nat. City, 174 U. S. 740;
R. R. v. Board of Commrs., 78 Fed. 258.
Making a rate is not a judicial function 61
Smyth v. Ames, 169 U. S. 466;
Reagan v. Trust Co., 154 U. S. 362;
Lake Shore v. Smith, 173 U. S. 684;
R. R. v. Gill, 156 U. S. 664;
R. R. v. Wellman, 143 U. S. 339;
R. R. v. Blake, 94 U. S. 180;
Munn v. Illinois, 94 U. S. 113;
Stone v. Trust Co., 116 U. S. 307;
Storrs v. Railroad, 29 Fla. 617; 11 S. R. 227;
Ga. R. R. v. Smith, 128 U. S. 174;
Dow v. Beidelman, 125 U. S. 680;
Budd v. New York, 143 U. S. 517;
Cov. Turnpike Co. v. Sandford, 164 U. S. 578.
Ky. Act of March 10, 1900, does not confer judicial power on the commission, and the making of a rate is not the enforcement of a judgment or the infliction of a penalty 70
Western Union v. Myatt, 98 Fed. 341, 345;
State v. Johnson, 60 Pac. 1068;
R. R. v. Inters. Com. Com., 162 U. S. 184;
Inters. Com. Com. v. R. R., 167 U. S. 507;
Inters. Com. Com. v. R. R., 168 U. S. 144;
State v. Wilson, 28 S. E. R. 554.

The act is not unconstitutional because it does not expressly provide for a judicial investigation or a hearing as to the reasonableness of the rate after it is fixed 73
Fitts v. McGhee, 172 U. S. 516;
R. R. v. Minnesota, 134 U. S. 418;
R. R. v. Trammel, 53 Fed. 197;
Act of March 10, 1900, does not violate the State Constitution 78
L. & N. v. Comth., 46 S. W. 707;
Pennington v. Woolfolk, 79 Ky. 13;
Stone, Auditor, v. Wilson, 19 Ky. Law Rep. 126;
Morton v. Woodford, 99 Ky. 367.

IV. Arbitrary Power and Discrimination 79
That a different rate may be made for different roads constitutes neither arbitrary power nor unjust discrimination, so long as the rule by which the rates are fixed is uniform 79
Reagan v. Trust Co., 154 U. S. 362;
R. R. v. Tompkins, 176 U. S. 167;
Smyth v. Ames, 169 U. S. 540, 547;
Id. 64 Fed. 165;
Cov. Turnpike v. Sandford, 164 U. S. 578;
Id. 14 Ky. Law Rep. 689; 20 S. W. 1031;
Munn v. Illinois, 94 U. S. 113;
R. R. v. Gill, 156 U. S. 664;
R. R. v. Minnesota, 134 U. S. 418;
R. R. v. Iowa, 94 U. S. 164;
Stone v. Trust Co., 116 U. S. 307;
Storrs v. R. R., 29 Fla. 617; 11 S. R. 227;
Ruggles v. Illinois, 108 U. S. 526;
Budd v. New York, 143 U. S. 517;
Comth. v. Cov. Bridge, 14 Ky. Law Rep. 836; 21 S. W. 1042.
Classification proceeding on any difference which has a reasonable relation to the subject matter

sought to be accomplished is unobjectionable, though inequality results. Railroads have always formed a separate and distinct class 89
R. R. v. Matthews, 174 U. S. 96;
Barbier v. Connolly, 113 U. S. 27;
Williams v. Mississippi, 170 U. S. 214;
Grundling v. Chicago, 177 U. S. 183;
Budd v. New York, 143 U. S. 517;
Dow v. Beidelman, 125 U. S. 680;
Magoun v. Trust Co., 170 U. S. 282;
Orient Ins. Co. v. Daggs, 172 U. S. 560;
R. R. v. McKee, 127 U. S. 205;
R. R. v. Beckwith, 129 U. S. 26;
Bowman v. Lewis, 101 U. S. 22;
Hayes v. Missouri, 120 U. S. 68;
Soon King v. Crowley, 113 U. S. 703.

V. CONTRACT 96
The police power of the state relating to the regulation of the rates of common carriers can not be bargained away 96
Stone v. Mississippi, 101 U. S. 814;
Douglas v. Comth. 168 U. S. 488;
Fertilizing Co. v. Hyde Park, 97 U. S. 659;
L. & N. R. R. v. Ky., 161 U. S. 677;
Boston Beer Co. v. Massachusetts, 97 U. S. 25;
N. O. Gas Light Co. v. Louisiana Light Co., 115 U. S. 650;
Mugler v. Kansas, 123 U. S. 623;
Slaughter House Cases, 111 U. S. 746;
Ruggles v. Illinois, 108 U. S. 536;
New Jersey v. Yard, 95 U. S. 104;
Stone v. Trust Co. 116 U. S. 307;
R. R. v. Illinois, 146 U. S. 387;
R. R. v. Nebraska, 170 U. S. 57;
R. R. v. Bristol, 151 U. S. 556;
R. R. v. Defiance, 167 U. S. 88;
Pearsall v. R. R. 161 U. S. 648;
R. R. v. Transp. Co., 25 W. Va. 324.

For a charter provision to come to an irrevocable contract fixing rates for all time, it must be clear, to the exclusion of a reasonable doubt, and must contain words exempting the corporation from future control. Merely to fix a maximum rate in the charter is not sufficient 114

Tiedeman on State and Federal Control, 952, 955;
Russell on Police Powers of State, 127, 128;
Cent. Transp. Co. v. Pullman, 139 U. S. 49;
Minott v. R. R., 18 Wall. 204;
Bailey v. Maguire, 22 Wall. 215;
Stone v. Wisconsin, 94 U. S. 181;
Fertilizing Co. v. Hyde Park, 97 U. S. 659;
Ruggles v. Illinois, 108 U. S. 536;
Id. 91 Ill. 262;
R. R. v. Illinois, 108 U. S. 541;
Stone v. Trust Co., 116 U. S. 307, 347;
Banking Co. v. Smith, 128 U. S. 174;
R. R. v. Minnesota, 134 U. S. 418, 467;
Smyth v. Ames, 169 U. S. 466;
Turnpike v. Sandford, 164 U. S. 578;
Id. 14 Ky. Law Rep. 689;
Comth. v. Covington Bridge, 21 S. W. 1042;
R. R. v. Miller, 132 U. S. 75;
Winchester Turnpike Co. v. Croxton, 98 Ky. 739; 33 L. R. A. 189;
Ragan v. Aiken, 9 Lea (Tenn.) 610;
Water Co. v. Fergus, 178 Ill. 571; 53 N. E. 363;
City of Danville v. Danville Water Co., 178 Ill. 399; 53 N. E. 118;
Id. 180 Ill. 235, 54 N. E. 224;
Freeport Water Co. v. City of Freeport, 57 N. E. 862.

A reservation of the right to alter, amend or repeal, expressed either in a general law or in the charter prevents a provision from becoming an irrevocable contract 139

Tiedeman State and Fed. Control, 980;
Citizens' Savings Bank v. Owensboro, 173 U. S. 636.

APPENDIX:

Constitution of Kentucky relating to the Railroad Commission 141
Statute law of Kentucky governing Railroad Commission 143
General law of 1856, reserving the right of alteration, amendment and repeal 150
General law of Kentucky previous to Constitution of 1891 relating to rates of common carriers . . 151
Acts amending the charter of the L. & N. R. R. Co. and charters therein referred to, so far as they relate to rates 152
Statute law limiting railroad franchise to corporations 158

SUPREME COURT OF THE UNITED STATES.

CHARLES C. McCHORD, &c., - - - *Appellants,*
396 vs.
LOUISVILLE & NASHVILLE RAILROAD COMPANY, - *Appellee.*

CHARLES C. McCHORD, &c., - - - *Appellants,*
397 vs.
THE LOUISVILLE, HENDERSON & ST. LOUIS RAILWAY COMPANY, - - - - - *Appellee.*

CHARLES C. McCHORD, &c., - - - *Appellants,*
398 vs.
THE CHESAPEAKE & OHIO RAILWAY COMPANY - - - - - - - *Appellee.*

CHARLES C. McCHORD, &c., - - - *Appellants,*
399 vs.
THE SOUTHERN RAILWAY COMPANY IN KENTUCKY, - - - - - - - *Appellee.*

CHARLES C. McCHORD, &c., - - - *Appellants,*
400 vs.
THE CINCINNATI NEW ORLEANS & TEXAS PACIFIC RAILWAY COMPANY, - - - *Appellee.*

BRIEF FOR APPELLANTS.

Statement.

The above entitled five causes have been ordered to be heard together, and are appealed from final decrees of the Circuit Court of the United States for the District of Kentucky, entered on the 25th of July, 1900, perpetually

enjoining the appellants, railroad commissioners of the state of Kentucky, from exercising any authority or doing any of the things required by an act of the General Assembly of the Commonwealth of Kentucky, approved March 10, 1900, which is in words and figures as follows:

"Be it enacted by the General Assembly of the Commonwealth of Kentucky:

"Section 1. When complaint shall be made to the railroad commission accusing any railroad company or corporation of charging, collecting or receiving extortionate freight or passenger rates, over its line or lines of railroad in this Commonwealth, or when said commission shall receive information or have reason to believe that such rate or rates are being charged, collected or received, it shall be the duty of said commission to hear and determine the matter as speedily as possible. They shall give the company or corporation complained of not less than ten days' notice, by letter mailed to an officer or employe of said company or corporation, stating the time and place of the hearing of same; also the nature of the complaint or matter to be investigated, and shall hear such statements, argument or evidence offered by the parties as the commission may deem relevant, and should the commission determine that the company or corporation is, or has been, guilty of extortion, said commission shall make and fix a just and reasonable rate, toll or compensation, which said railroad company or corporation may charge, collect or receive for like services thereafter rendered. The rate, toll or compensation so fixed by the commission shall be entered and be an order on the record book of their office and signed by the commission, and a copy thereof mailed to an officer, agent or employe of the railroad company or corporation effected thereby, and shall be in full force and effect at the expiration of ten days thereafter, and may be revoked or modified by an order likewise entered of record. And should said railroad company or corporation, or any officer, agent or employe thereof, charge, collect or receive a greater or higher

rate, toll or compensation, for like services thereafter rendered, than that made and fixed by said commission, as herein provided, said company or corporation, and said officer, agent or employe, shall each be deemed guilty of extortion, and upon conviction shall be fined for the first offense in any sum not less than five hundred dollars, nor more than one thousand dollars, and upon a second conviction in any sum not less than one thousand dollars, nor more than two thousand dollars, and for a third and succeeding convictions in any sum not less than two thousand dollars, nor more than five thousand dollars.

"Sec. 2. The circuit court of any county into or through which the line or lines of road carrying such passenger or freight, owned or operated by said railroad, and the Franklin Circuit Court, shall have jurisdiction of the offense against the railroad company or corporation offending, and the circuit court of the county where such offense may be committed by said officer, agent or employe, shall have jurisdiction in all prosecutions against said officer, agent or employe.

"Sec. 3. Prosecutions under this act shall be by indictment.

"Sec. 4. All prosecutions under this act shall be commenced within two years after the offense shall have been committed.

"Sec. 5. In making said investigation, said commission may, when deemed necessary, take the depositions of witnesses before an examiner or notary public, whose fee shall be paid by the state, and upon the certificate of the chairman of the commission, approved by the governor, the auditor shall draw his warrant upon the treasurer for its payment."

The main questions involved are:

1. The jurisdiction of the court to render a decree of injunction in any of these cases.

2. The constitutionality, both under the state and Federal Constitutions, of the act above set out.

While the above act was approved on March 10, 1900,

it did not go into effect, under Section 55 of the Constitution of Kentucky, until ninety days thereafter. Said section reads as follows:

> "No act, except general appropriation bills, shall become a law until ninety days after the adjournment of the session at which it was passed, except in cases of emergency, when, by the concurrence of a majority of the members elected to each House of the General Assembly, by a yea and nay vote entered upon their journals, an act may become a law when approved by the governor; but the reasons for the emergency that justifies this action must be set out at length in the journal of each House."

For the purposes of convenience, we shall designate the first named appellee, Louisville & Nashville Railroad Company, as the Louisville Company; the second appellee, The Louisville, Henderson & St. Louis Railway Company, as the Henderson Company; the third appellee, The Chesapeake & Ohio Railway Company, as the Chesapeake Company; the fourth appellee, The Southern Railway Company in Kentucky, as the Southern Company, and the fifth appellee, The Cincinnati, New Orleans & Texas Pacific Railway Company, as the Cincinnati Company.

On the 5th day of July, 1900, all of the above appellees, except the Cincinnati Company, filed their bills in equity in the United States Circuit Court, sitting at Louisville, seeking a temporary injunction, and, on final decree, a perpetual injunction against the appellants, Charles C. McChord, J. F. Dempsey and John C. Wood, comprising the board of railroad commissioners for the state of Kentucky, restraining them from exercising any of the powers or doing any of the acts set forth in the above act.

On the 11th day of July, 1900, the Cincinnati Company filed a similar bill in the circuit court, sitting at Covington.

All of the bills are apparently drawn upon the same model, make the same allegations and pray the same relief, and the questions involved are common to all, except that in the bill of the Louisville Company, and in the bill of the Cincinnati Company, the additional question of a contract with the state of Kentucky, relative to rates that can be charged, is raised.

The Louisville Company is a corporation of the state of Kentucky, operating lines within the state under original construction, as set out in its bill, amounting to 413.53 miles, and operating under purchase 925.59 miles, or, in all, 1,339.12 miles. It alleges in its bill that both within and without the state of Kentucky it owns and operates 3,000 miles of railroad. The gravamen of its complaint is that, under and by virtue of its original charter granted by the state of Kentucky on March 5, 1850, the maximum rates which it might charge for freight and passengers were fixed, and that the rates so fixed amount to a contract with the state of Kentucky within the protection of the Federal Constitution. It further claims that the Act of March 10, 1900, operates to deprive it of its property without due process of law, and to deny it the equal protection of the laws, and that the act is an attempt by the state to regulate interstate commerce.

The Henderson Company is also a corporation, organized under the laws of the state of Kentucky, and whose termini are all within the territorial limits of that state. Its bill is exactly similar to that of the Louisville Company, except that it claims no contract relative to its rates.

The Chesapeake Company is a corporation, under the laws of the state of Virginia, operating, as alleged in its bill, more than 440 miles of railroad in the state of Kentucky, as a part of its system of more than 14,444 miles in extent as traversed in various states. The allegations of its bill are exactly similar to those of the Louisville Company, except that it claims no contract right.

The Southern Company is a corporation, organized under the laws of the state of Kentucky, *and operating*, as alleged in its bill, 122 miles of railroad in the state of Kentucky, and the allegations of its bill are exactly similar to those of the Louisville Company, except that it claims no contract right.

The Cincinnati Company is a corporation, organized under the laws of the state of Ohio, operating 197.88 miles of railroad in the state of Kentucky, and, in addition thereto, it operates a line of railroad in Ohio and in Tennessee. The allegations of its bill are the same as those of the Louisville Company. It claims a contract under the protection of the Federal Constitution, touching its rates, by an act of the state of Kentucky, approved February 13, 1872.

It will thus be seen that all of the appellees invoked the jurisdiction of the Federal court upon the theory that the Act of March 10, 1900, invades certain rights of the railroads guaranteed by the Constitution of the United States.

Motions for interlocutory injunctions in the several cases were made on July 9, 1900, and passed to July 13th, and on that day the appellants interposed demurrers to the bills in the several cases, on the ground that the bills did not show a case entitling the complainants to any relief, and because the court was without jurisdiction to determine the matters set forth. On the 16th day of July, 1900, an interlocutory injunction, in acordance with the prayer of the bill, was entered and an opinion delivered. On the 25th day of July, 1900, a final decree was entered in each of the cases, overruling the appellants' demurrer to the bills, and upon the appellants declining to plead further the temporary injunction was made perpetual, the decree reading as follows:

> "And thereupon, this cause, by consent in open court of all parties, presently came on for hearing in

chief, and, all parties submitting this cause for final decree, the court doth order that the said bill of complaint be taken as confessed against the said defendants, and doth further adjudge, order and decree that the injunction heretofore granted in this cause to restrain the said defendants, Charles C. McChord, J. F. Dempsey and John C. Wood, from entertaining any complaint against complainant, or giving any notice to or conducting any hearing against complainants, or fixing any rates, toll or compensation, which complainant may charge, collect or receive, or from entering any such rate, toll or compensation on the record book of their office, or signing the same or mailing any copy thereof to any officer, agent or employe of the complainant, or from taking any action whatever against or in relation to the complainant under said Act of March 10, 1900, entitled, 'An act to prevent railroad companies or corporations owning or operating a line or lines of railroad, and its officers, agents or employes, from charging, collecting or receiving extortionate freight or passenger rates in this Commonwealth, and to further increase and define the duties and powers of the railroad commission in reference thereto, and prescribe the manner of enforcing the provisions of this act and penalties for the violation of its provisions,' approved on the 10th day of March, 1900, be, and it is hereby, made perpetual, as well to said named defendants as to their successors in office, of the railroad commission of Kentucky, and their agents and servants.

"And the court doth further order that the said defendants shall pay the costs of the complainant herein incurred."

From these decrees appeals were prayed and taken to this court, and for a reversal thereof the following are the

Errors Assigned.

1.

"That the United States Circuit Court in and for the District of Kentucky erred in overruling the demurrer interposed by these defendants and appellants to the original bill filed in said cause.

2.

"That the said court erred in rendering judgment against these defendants and appellants in said cause upon the pleadings in said cause, and that said judgment is contrary to the law and the facts, as stated in the bill of complaint in said cause:

3.

"That the said court erred in rendering a perpetual order of injunction against these defendants and appellants.

4.

"That the said court erred in holding that it had jurisdiction of these defendants and appellants upon the subject matter set forth in the bill of complaint, and before these defendants and appellants had proceeded under said bill to make or establish any rates against the complainant and appellee.

5.

"That the said court erred in holding that under the statute of the state of Kentucky complained of, these defendants and appellants act as a judicial body, or are delegated judicial powers, contrary to the Constitution of the state of Kentucky.

6.

"That the said court erred in holding that the said statute complained of deprives the complainant and appellee of its property without due process of law, or denies to the complainant and appellee the equal protection of the law, as guaranteed by the Fourteenth Amendment of the Constitution of the United States.

7.

"That the said court erred in holding that the said statute complained of attempts to regulate interstate commerce, and is in violation of Article 1, Section 8 of the Constitution of the United States.

8.

"That the said court erred in holding that the said statute complained of is void and unconstitutional because it does not provide a judicial hearing for the complainant and appellee with reference to the rates to be fixed thereunder, or after said rates shall have been fixed.

9.

"That the said court erred in holding that the said statute complained of is void because it does not provide that the rates which shall be fixed thereunder shall apply to all railroads in the state of Kentucky, and that because of said failure the said statute denies to the complainant and appellee the equal protection of the law.

10.

"That the said court erred in holding that the complainant and appellee, under its charter, has a contract with the state of Kentucky, whereby its rates have been fixed, and that the statute complained of violates its said contract, as forbidden by Article 1, Section 10 of the Constitution of the United States."

Argument.

The above assignment of errors, for convenience of argument, can be grouped, and shall be discussed by us, under the following condensed propositions:

1. The power and functions delegated to the board of railroad commissioners by the state of Kentucky, under the Act of March 10, 1900, were either entirely legislative, or so far quasi-legislative, as not to be within the control or direction of the judiciary, and until the board of railroad commissioners executed some of the powers and established a rate, there was no jurisdiction in the judiciary, either state or Federal, to prevent it from acting.

2. The act is not an attempt by the state to regulate or interfere with interstate commerce, but applies entirely to domestic commerce.

3. Judicial power is not conferred upon the board by the act, nor does any question relating to the regulation of rates become a judicial question until after the rate is made. Then, for the first time, are the parties of right entitled to a judicial investigation with reference to the reasonableness of the rate which has been fixed.

4. The act is equal and uniform in its operation, and does not confer arbitrary power upon the board.

5. Neither the Louisville Company nor the Cincinnati Company has any contract with reference to its rates under the protection of the Federal Constitution, even if this important function of the police power be a legitimate subject matter of a contract.

The converse of each of these propositions was contended for by the appellees and adjudged in their favor by the decree appealed from.

Jurisdiction.

We disclaim any purpose of questioning the jurisdiction of the court to restrain the enforcement against railroads of a tariff rate that is unreasonable.

By the repeated adjudications of this court it is held that an unreasonably low rate operates to deprive the railroad of the use of its property, and, to that extent, of its property, without due process of law, and that to deny to a railroad a reasonable profit on its investment is to deny to it the equal protection of the law guaranteed by the Fourteenth Amendment of the Federal Constitution, and, therefore, the Federal court has original jurisdiction.

Smyth v. Ames, 169 U. S. 466.
Reagan v. Trust Company, 154 U. S. 362.
Railroad v. Minnesota, 134 U. S. 418.
Railroad v. Tompkins, 176 U. S. 167.

In taking jurisdiction, however, under this rule, it is an essential condition that a rate has been fixed, because until then there is and can be no such trespass upon or taking of property, or even an attempt to trespass upon or to take, as violates the guaranties of the Fourteenth Amendment.

In the case at bar, it will be observed, the jurisdiction of the court was invoked and exercised before any rate had been fixed, and, in fact, before even any attempt had been made to fix a rate. The bills of complaint simply allege that the board of railroad commissioners had given notice that they would investigate the reasonableness of the rates in force by the railroads, and thus the hands of the board in the exercise of this important state function were stayed, even before the threshold was reached. For the maintenance of this jurisdiction, it was the theory of the circuit court that the Act of March 10, 1900, is so far void, because of its invasion of constitutional rights, as to give authority for no act that can be committed under it, and protect nothing that can be done by virtue of its authority.

This principle would be correct were it confined exclusively to executive acts, but has no application insofar as it applies to legislative or quasi-legislative acts, nor to administrative acts requiring the exercise of discretion and judgment, at least, where only, in certain contingencies, the exercise of such discretion or judgment will invade the constitutional rights of others. It is only property and property rights that can move a court of equity to action.

Taylor v. Beckham, 178 U. S. 548, 610.
Ex parte Sawyer, 124 U. S. 200.

With the exception of the case at bar, and the case of Stone v. Trust Company, 116 U. S. 646, where the jurisdiction of the Federal court has been assumed, the rate

has been fixed and the jurisdiction has been invoked on the ground that it was unreasonable and operated to deprive the railroad of either its property or the lawful use of its property.

It is well established by a long line of cases in this court, which will be considered in the course of this argument, that the fixing or making of a rate is a legislative or, at least, a quasi-legislative function, and that it is only the reasonableness of a rate which has been fixed that calls for the exercise of a judicial investigation. The courts have never assumed to make a rate, nor to say what would be or is a reasonable rate. Their jurisdiction is exhausted when they determine whether or not the rate which has been fixed by other departments of the government is or is not reasonable. The making of a rate is the making of a rule for future conduct, and, therefore, legislative. An investigation of the reasonableness of a rate fixed determines its operation in the past, and is judicial. This line of demarcation is sharply drawn by the decisions.

It is in this feature that the case at bar differentiates from all other cases that have heretofore been before this court touching the question of the power of states with reference to the fixing of reasonable maximum rates for common carriers, and it is upon this differentiation that we contend that the court was without jurisdiction to decree an injunction. We do not understand the rule to be that the judicial power is exercised as a veto power upon the legislative department, nor that appeals from other departments of the government lie to the judiciary simply for the purpose of determining abstract questions.

In the matter of the making of maximum rates for common carriers, until a rate has been fixed, to stay the hands of the state is to exercise the jurisdiction of the court for the determination of a mere abstraction. Until the rate is fixed, it can not be said that an unreasonable rate will be fixed, nor can it be said that any rate will be

fixed. If the commission, charged with quasi-legislative power, may be enjoined, in advance of its action, may not the legislature itself be enjoined, upon an allegation that it will make an unreasonable rate? If the legislature may confer the power to make rates upon the commission, in the exercise of this power, it is entitled to the same immunity from judicial interference which the legislature itself enjoys.

In the case of Railroad v. Wellman, 143 U. S. 359, in an opinion delivered by Mr. Justice Brewer, this court said:

> "The theory upon which, apparently, this suit was brought is that parties have an appeal from the legislaure to the courts, and that the latter are given an immediate and general supervision of the constitutionality of the acts of the former. Such is not true."

In the case of Railroad v. Minnesota, 134 U. S 418, Mr. Justice Bradley uses the following language, which, while not applicable to the case after a rate has been fixed, is, we think, applicable to the case at bar:

> "There must be a final tribunal somewhere for deciding every question in the world. Injustice may take place in all tribunals. All human institutions are imperfect—courts as well as commissions and legislatures. Whatever tribunal has jurisdiction, its decisions are final and conclusive, unless an appeal is given therefrom. The important question always is: What is the lawful tribunal for the particular case?"

In reference to the fixing of a rate, it must be conceded that the lawful and only tribunal is the legislative department of the government. If this be true, then with reference to the fixing of a rate an attempt to stay the hand and hush the voice of the board of railroad commis-

sioners is the same as enjoining the legislature, and, therefore, the state.

We concede that in the cases cited, supra, of Reagan v. Trust Company, 154 U. S. 362, and Smyth v. Ames, 169 U. S. 466, with reference to the enforcement of a rate which had been fixed, it was ruled that an action against the railroad commissioners was not an action against the state of which they were officers.

But in the case of Fitts v. McGhee, 172 U. S. 516, it was held that a suit to restrain the governor and attorney general of the state of Alabama from putting into force and effect a schedule of maximum rates fixed by the legislature for the use of a toll bridge over the Tennessee river, between the counties of Colbert and Lauderdale, known as the Florence Bridge, was a suit against the state, and that the United States Circuit Court was without jurisdiction to decree any relief prayed in the bill, Mr. Justice Harlan, in delivering the opinion of the court, distinguished the principles applicable to that case from those applicable to the railroad commissioner cases, supra, and kindred cases.

We contend that the case at bar is much more nearly allied in principle to this case than to the railroad commissioner cases. In the case cited, the Act of the General Assembly of Alabama, approved February 9, 1895, prescribed certain maximum rates of toll to be charged on the Florence Bridge, and declared that should the owners, lessees or operators of the bridge, by themselves or agents, demand or receive from any person a higher rate of toll than was prescribed, he or they should forfeit to such person twenty dollars for each offense, to be recoverable before any justice of the peace or notary public or ex-officio justice of the peace of either of the counties of Colbert or Lauderdale. By a provision of the Alabama Code then in vogue, it was provided that any person acting as an officer, agent, servant or employe of any turnpike company, incorporated road

or bridge company who pays, receives or demands any greater charge or toll than is authorized by the charter, or who takes, fixes or receives any unreasonable charge or toll, may, on conviction, be fined not more than one hundred dollars. Under the act no particular officer was charged with the duty of its enforcement, but this fell among the general duties of the executive officers charged with the enforcement of the laws generally. When the act was passed, the cases of Thomas v. Memphis & Charleston Railroad Company, and Central Trust Company v. Same, were pending in the United States Circuit Court for the District of Alabama, and shortly after the passage of the act, to wit, February 14, 1895, Charles M. McGhee and Henry Fink were appointed receivers of the railroad. The railroad was the owner of the bridge in question, and claimed in its behalf a contract with the state of Alabama governing its tolls. After the passage of the act the railroad refused to put in effect the schedule of tolls fixed, and a great number of suits were brought to recover the penalties, and a number of indictments were returned against the officers, agents and employes. In this condition of affairs a bill was filed in the United States Circuit Court, in equity, by the receivers, against the state of Alabama, William C. Oates, its governor, and William C. Fitts, its attorney general, seeking to enjoin and restrain the defendants from enforcing the act and from prosecuting the indictments, and from collecting the penalties, and to restrain them from seeking, by mandamus or any other procedure, to enforce the schedule of rates. Subsequently, and before decree, the bill was dismissed as against the state and prosecuted against its governor and attorney general. When the final decree was rendered the term of William C. Oates, as governor, had expired, and the case was discontinued as to him, but a final decree was entered, adjudging the act of the legislature of the state to be a violation of the constitutional rights of the owners of the bridge, and of

the complainants, as their representatives, in that it fixed a rate of toll for the bridge, which was not fairly and reasonably compensatory, and the said act was declared to be invalid and inoperative, and the interlocutory injunction was made perpetual. By the interlocutory decree, William C. Fitts, the attorney general of the state, and William H. Gillian, who had been added as a party defendant, and all persons whomsoever, were enjoined from instituting or procuring the institution of any proceeding against the plaintiffs, or either of them, by mandamus or otherwise, to compel the observance and obedience of the act in reference to the rate of tolls fixed thereby over the Florence Bridge. On behalf of the complainants it was contended, under the rule of the case of Railroad *v.* Minnesota, 134 U. S. 459, that, as the act did not provide for a judicial hearing as to the reasonableness of the rates, appropriate jurisdiction existed in the Federal courts sitting in equity to determine the constitutionality of the act, and in one suit to settle all litigation and prevent a multiplicity of actions. It was contended by the defendants that the suit was practically one against the state of Alabama, and, therefore, inhibited by the Eleventh Amendment of the Federal Constitution. In holding that the circuit court was without jurisdiction, because the suit was practically one against the state of Alabama, Mr. Justice Harlan, delivering the opinion of the court, said, in distinguishing the principles of that case from the principles governing the railroad commission cases, supra:

> "Upon examination it will be found that the defendants in each of those cases were officers of the state, specially charged with the execution of a state enactment alleged to be unconstitutional, but under the authority of which, it was averred, they were committing, or were about to commit, some specific wrong or trespass to the injury of the plaintiff's rights. There is a wide difference between a suit

against individuals holding official positions under a state, to prevent them, under the sanction of an unconstitutional statute, from committing by some positive act a wrong or trespass, and a suit against officers of a state merely to test the constitutionality of a state statute, in the enforcement of which those officers will act only by formal judicial proceedings in the courts of the state. In the present case, as we have said, neither of the state officers named held any special relation to the particular statute alleged to be unconstitutional. They were not expressly directed to see to its enforcement. If, because they were law officers of the state, a case could be made for the purpose of testing the constitutionality of the statute by an injunction suit brought against them, then the constitutionality of every act passed by the legislature could be tested by a suit against the governor and the attorney general, based upon the theory that the former, as the executive of the state, was, in a general sense, charged with the execution of all its laws, and the latter, as attorney general, might represent the state in litigation involving the enforcement of its statutes. That would be a very convenient way for obtaining a speedy judicial determination of questions of constitutional law which may be raised by individuals, but it is a mode which can not be applied to the states of the Union consistently with the fundamental principle that they can not, without their assent, be brought into any court at the suit of private persons. *If their officers commit acts of trespass or wrong to the citizen, they may be individually proceeded against for such trespasses or wrong. Under the view we take of the question, the citizen is not without effective remedy when proceeded against under a legislative enactment void for repugnancy to the supreme law of the land; for whatever the form of proceeding against him, he can make his defense upon the ground that the statute is unconstitutional and void. And that question can be ultimately brought to this court for final determination.* (The italics are ours.) . . . The plaintiffs state that the toll-gatherers in their service had been indicted in a state court for violating the provisions of the Act of 1895 in respect of tolls. Let them ap-

pear to the indictment and defend themselves upon the ground that the state statute is repugnant to the Constitution of the United States. The state court is competent to determine the question thus raised, and is under a duty to enforce the mandates of the supreme law of the land. Robb v. Connolly, 111 U. S. 624 (28: 542). And if the question is determined adversely to the defendants in the highest court of the state in which the decision could be had, the judgment may be re-examined by this court upon writ of error. That the defendants may be frequently indicted constituted no reason why a Federal court of equity should assume to interfere with the ordinary course of criminal procedure in a state court."

To the same effect, see In re Ayres, 123 U. S. 443, 485, 496-500, 505.

In the case at bar the railroad commissioners are not charged with the execution of, nor have they anything to do with, the enforcement of the rate fixed by them under the Act of March 10, 1900, except, perhaps, to direct the attention of the grand jury or the prosecuting officer to the matter. The power conferred upon them by that act is exhausted in making and changing the rate, from time to time, so as to keep it fair and reasonable to the public. In this feature the act in question is radically different from the legislative acts under investigation in the railroad commission cases, supra.

The case at bar is stronger for the application of the principle applied in the case of Fitts v. McGhee than were the facts of that case, because in the case at bar no rate had been fixed by the commissioners when the jurisdiction of the court was invoked, but they had just entered upon the performance of a duty over which, it must be conceded, the courts have no control, to wit, the making of a rate for future guidance.

In the case of Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R. Company, 167 U. S. 479, it was

contended, in behalf of the commission, that the power to pass upon the reasonableness of existing rates implied a right to prescribe rates. Mr. Justice Brewer, in passing upon this contention in the opinion delivered for the court, said, on page 494:

> "There were three obvious and dissimilar courses open for consideration. Congress might itself prescribe the rates; or it might commit to some subordinate tribunal this duty; or it might leave with the companies the right to fix rates, subject to regulations and restrictions, as well as to that rule which is as old as the existence of common carriers, to wit, that rates must be reasonable. There is nothing in the act fixing rates. Congress did not attempt to exercise that power, and if we examine the legislative and public history of the day it is apparent that there was no serious thought of doing so."

And again, on page 501:

> "The power given is the power to execute and enforce, not to *legislate*. The power given is partly judicial, partly executive and administrative, *but not legislative*." (Italics are ours.)

And again, on page 505:

> "We have, therefore, these considerations presented: First, *the power to prescribe a tariff of rates for carriage by a common carrier is a legislative, and not an administrative or judicial function*; and having respect to the large amount of property invested in railroads, the various companies engaged therein, the thousands of miles of road, and the millions of tons of freight carried, the varying and diverse conditions attaching to such carriage, is a power of supreme delicacy and importance. Second, that Congress has transferred such a power to any administrative body is not to be presumed or implied from any doubtful and uncertain language. The words and phrases efficacious to make such a delegation of power are well understood and have been frequently

> used, and if Congress had intended to grant such a power to the Interstate Commerce Commission, it can not be doubted that it would have used language open to no misconstruction, but clear and direct. Third, incorporating into a statute the common-law obligation resting upon the carrier to make all its charges reasonable and just, and directing the commission to execute and enforce the provisions of the act, does not by implication carry to the commission or invest it with the power to exercise the *legislative function of prescribing rates* which shall control in the future." (Italics are ours.)

And again, on page 509:

> "Our conclusion, then, is that Congress has not conferred upon the commission the *legislative power* of prescribing rates, either maximum or minimum or absolute." (Italics are ours.)

The doctrine of this case, referring the power to fix rates to the legislative department of the government, was followed and applied in the case of Interstate Commerce Commission v. Alabama Midland Railway Company, 168 U. S. 144.

In the case of Railroad v. Wellman, 143 U. S., Mr. Justice Brewer, in speaking for the court, said:

> "The legislature has power to fix rates, and the extent of judicial interference is protection against unreasonable rates."

To the same effect are the cases of

> Stone v. Trust Company, 116 U. S. 307.
> Railroad v. Minnesota, 134 U. S. 418.

The function in fixing a rate is not purely administrative, nor executive, but is essentially legislative, because it fixes a rule or standard for future conduct, an essential attribute of the law-making department. Though a leg-

islative function, it is well established that it can be delegated to an administrative board. Though it was formerly considered that there was some distinction between the operation and effect of a rate fixed by the legislature from that fixed by a board, it is now established that there is none.

Covington Turnpike Company v. Sandford, 164 U. S. 580.
Smyth v. Ames, 169 U. S. 466.
Reagan v. Trust Company, 154 U. S. 362.
Railroad v. Gill, 156 U. S. 664.
Railroad v. Minnesota, 134 U. S. 418.
Budd v. New York, 143 U. S. 517.
Lake Shore v. Smith, 173 U. S. 684.

Mr. Justice Bradley, in his dissenting opinion in the case of Railroad v. Minnesota, 134 U. S., likened the performance of such a duty by a commission to the performance of a similar duty by a committee of the legislature, and held that each was in the discharge of exactly the same character of power.

We contend, therefore, that for the court to assume jurisdiction against the railroad commissioners in advance of a rate fixed, as in the case at bar, and for the purpose of preventing them from fixing a rate, is to deny to the state the right to control and regulate common carriers with reference to their rates, which has never been denied as a proper exercise of the police power.

Not even did those who dissented from the rule in the case of Munn v. Illinois, 94 U. S. 113, contend that it was without the power of the state to regulate public corporations and quasi-public corporations which perform public duties.

To stay the action of the board of commissioners with reference to the performance of this duty would permit the court, by injunction, to restrain the legislature, a power which has never been conceded by the courts to exist. See

Cooley on Constitutional Limitation, 55, 153.
State v. Hitchcock, 1 Kan. 178.
State v. Boone County, 50 Mo. 317.
Patterson v. Barlow, 60 Pa. St. 54.

The theory of our government is that the departments shall be co-ordinate, separate and distinct, and that neither shall encroach upon or exercise any powers or functions of the other.

Works on Courts and Their Jurisdiction, 183.

While the judicial department may exercise power to enforce the performance of merely ministerial duties by officers of the other departments, it never exercises jurisdiction to enforce or control action on the part of the other departments or their officers, where the exercise of judgment or discretion is called for.

United States v. Guthrie, 17 How. 284.
Brashear v. Mason, 6 How. 92.
Decatur v. Pawling, 14 Peter 497.
Marbury v. Madison, 1 Cranch, 137.

Mr. Works, in his book on Courts and Their Jurisdiction, on page 186, says:

> "It is the duty of the executive department of the government to enforce the laws. If the acts to be done in carrying the law into effect require the exercise of judgment or discretion, they are executive or political, and not ministerial, and can not be controlled by the courts. It makes no difference by whom an act is performed, whether by a ministerial, executive or judicial officer, in determining whether it is ministerial or not. The distinction depends upon the nature of the act done or to be done, and not upon the character of the officer by whom it is to be performed," citing Mississippi v. Johnson, 4 Wall. 475, and numerous other cases.

More than this, to enjoin the commissioners under the Act of March 10, 1900, is to enjoin the state. If, however, the exercise of jurisdiction in the case at bar be not open to any of these objections, we contend that in no case, and upon no principle approved by this court, has or can the jurisdiction be exercised in advance of the actual fixing of a rate. Until a rate is fixed, under the principles announced by this court in a number of cases, the question is not judicial. Until then, there is and can be no invasion or trespass upon the property or rights of another, or any taking or attempt at depriving another of his liberty or property without due process of law. As said in the case of Railroad v. Wellman, 143 U. S., supra:

> "The extent of judicial interference is protection against unreasonable rates."

It is not even alleged in the bills of complaint that the appellants intended or threatened to fix any specified rate, nor is it even alleged that they were attempting or threatening to make an unreasonable rate. The whole complaint is that if the appellants be permitted to exercise any of the functions delegated to them by the act, the appellees will be endangered. The allegations of the bill on this subject are as follows: (We quote from the bill of the Louisville Company, which is similar to the other bills, with the exception of the additional claim of impairment of contract.)

> "Defendants have called for and obtained from your orator a list of rates fixed and charged by it for transportation of freight and passengers over its railroads in the state of Kentucky, for the purpose of considering whether or not they shall be altered and reduced in accordance with the terms of said act, and are giving it out in speeches and interviews that they intend to proceed at once under said act, and, unless restrained by the order of this court, defendants will proceed at once to hear and determine com-

plaints under said act, although the same is in contravention of the Constitution of the United States in all the particulars hereinabove set out, and is, therefore, null and void, and will proceed thereupon to reduce your orator's rates to such as they think your orator should charge, and will thereafter, at pleasure, modify and still further reduce the rates so fixed, and if your orator does not observe the rates so fixed, no matter how unjustly and unreasonably low, your orator will be subjected to innumerable prosecutions throughout the state of Kentucky for failing to comply with such rates fixed in this unconstitutional manner, and it will be subjected to innumerable suits by consignors and consignees, who will claim the right to ship at said rates so unconstitutionally fixed, and to sue for any excess they may be charged over said rates, though rightfully charged, and at the same time all your orator's officers and agents and servants, though perfectly innocent of any offense, and though merely assisting your orator to maintain its constitutional rights, will be indicted, prosecuted and heavily fined, to the great demoralization of the public service which your orator is bound to render; and so it is, unless said defendants are restrained by the order of this court from proceeding under said act, your orator's contract rights will be impaired, it will be deprived of its property without due process of law, denied the equal protection of the law, and subjected to great, irreparable wrong and injury, and to a vast multiplicity of prosecutions and actions in the courts of said state."

From these allegations there can not arise even a presumption that the appellants, as railroad commissioners, intended to do any unlawful act or to fix any unjust or unreasonable rate. On the contrary, until a rate is fixed, the court will conclusively presume that the officers of a co-ordinate branch of the government will perform their duty, as required by law.

The case nearest in approach to the case at bar is that of Stone v. Trust Company, 116 U. S. 307. In that case

suit was brought by the Farmers' Loan & Trust Company, in the Federal Circuit Court for the Southern District of Mississippi, to enjoin the railroad commission of that state from enforcing against the Mobile & Ohio Railroad Company the provisions of a statute regulating freight and passenger rates on railroads in that state, and creating a commission to supervise the same. That act, like the act of Kentucky now under investigation, gave the commission the power to investigate the charges and rates of the railroad companies, and, upon such investigation, to determine whether the railroads were charging more than a just compensation for their services, and further provided that the commission should establish a just and reasonable tariff of charges for the railroad companies. The act delegated to the commission the duty and power of seeing that the act was enforced, and that actions for the recovery of the penalties, and the infliction of the punishment provided by the act, should be instituted. Before the commission had established a rate, as appears from the opinion of the court, delivered by Chief Justice Waite, suit was brought in the circuit court to enjoin the enforcement of the act, on the ground that it was void, as a whole, for transgressing various alleged constitutional prohibitions, among them the violation of a contract right and the regulation of interstate commerce. In reversing the lower court, and speaking upon this phase of the case, the court said:

> "As yet the commissioners have done nothing. There is certainly much they may do in regulating charges within the state which will not be in conflict with the Constitution of the United States. It is to be presumed they will always act within the limits of their constitutional authority. It will be time enough to consider what may be done to prevent it when they attempt to go beyond. . . . . Whether in some of its details the statute may be defective or invalid we do not deem it necessary to inquire, for this suit is brought to prevent the commis-

sioners from giving it any effect whatever as against this company. . . . When the commission has acted and proceedings are had to enforce what it has done, questions may arise as to the validity of some of the various provisions which will be worthy of consideration, but we are unable to say that, as a whole, the statute is invalid."

The question of the nature of the power exercised in enjoining the railroad commissioners does not seem to have been raised or considered in that case. There, as at bar, all of the complaint was speculative, but the court held that it would not indulge presumptions in favor of wrong action.

In the case of Spring Valley Water Works v. Schottler, 110 U. S. 347, the action was begun in the Supreme Court of the State of California for a writ of mandamus requiring the board of supervisors to take action and fill a vacancy in the board of commissioners for the purpose of determining the rates to be charged by the water company for water. It was claimed by the water company that by the Act of June 19, 1858, under which it was organized and erected its plant, it had a right to have the water rates fixed by a board of commissioners, to be selected, two by the city and county and two by the water company, nothwithstanding the intervening constitution which went into effect on January 1, 1880. On a writ of error to the Supreme Court of the state of California, this court, in an opinion delivered by Mr. Chief Justice Waite, in speaking upon the difference between the situation where rates have, and where they have not been fixed, said:

"What may be done if the municipal authorities do not exercise an honest judgment, or if they fix upon a price which is manifestly unreasonable, need not now be considered, for that proposition is not presented by this record. The objection here is not to any improper prices fixed by the officers, but to their power to fix prices at all. By the Constitution

and the legislation under it, the municipal authorities have been created a special tribunal to determine what, as between the public and company, shall be deemed a reasonable price during a certain limited period. Like every other tribunal established by the legislature for such a purpose, their duties are judicial in their nature, and they are bound in morals and in law to exercise an honest judgment as to all matters submitted for their official determination. It is not to be presumed that they will act otherwise than according to this rule. And here again it is to be kept in mind that the question before us is not as to the penalties to be inflicted on the company for a failure to sell at the prices fixed, but as to the power to fix the price; not whether the company shall forfeit its property and franchises to the city and county if it fails to meet the requirements of the Constitution, but whether the prices it shall charge may be established in the way provided for in that instrument. It will be time enough to consider the consequences of the omissions of the company when a case involving such questions shall be presented."

In Lake Shore v. Smith, 173 U. S. 684, this court, in an opinion delivered by Mr. Justice Peckham, holding to be invalid an act of the state of Michigan fixing maximum rates, and, in addition thereto, requiring the railroad to sell one thousand mile tickets to persons with a family, to be good for two years, at a rate reduced below that of the maximum, was careful not to be understood as asserting the doctrine that the courts assume jurisdiction to control legislative action. It is there said:

"The authority to legislate in regard to rates comes from the power to prevent extortion or unreasonable charges or exactions by common carriers or others exercising a calling and using their property in a manner in which the public have an interest. . . . In holding this legislation a violation of that part of the Constitution of the United States which forbids the taking of property without due process of law, and requires the equal protection of

> the laws, we are not, as we have stated, thereby interfering with the power of the legislature over railroads, as corporations or common carriers, to so legislate as to fix maximum rates, to prevent extortion or undue charges, and to promote the safety, health, convenience or proper protection of the public."

In Reagan v. Trust Company, 154 U. S. 367, the jurisdiction of the court was not sought until after the railroad commission had established a system of maximum rates, and it was then exercised wholly because it was proved that the rates were unreasonable and operated to deprive the railroads of their property. In that case the circuit court perpetually enjoined the commission from establishing other rates, and in this regard Mr. Justice Brewer, in delivering the opinion of the court reversing the judgment, said:

> "It follows from these considerations that the decree as entered must be reversed, insofar as it restrains the railroad commission from discharging the duties imposed by this act, and from proceeding to establish reasonable rates and regulations; but must be affirmed so far only as it restrains the defendants from enforcing the rates already established."

In Smyth v. Ames, 64 Fed. 165, and 169 U. S. 466, the statute of Nebraska itself established certain classifications and certain rates, with power in the board of transportation to further reduce the rates and, under certain conditions, to allow them to be enlarged, but not to exceed a named limit. This court, in an opinion by Mr. Justice Harlan, stated that in view of the adjudications, among other principles, this must be regarded as settled:

> "While rates for the transportation of persons and property within the limits of a state are primarily for its determination, the question whether

they are so unreasonably low as to deprive the carrier of its property without such compensation as the Constitution secures, and, therefore, without due process of law, can not be so conclusively determined by the legislature of the state, or by regulations adopted under its authority, that the matter may not become the subject of judicial inquiry. The cases before us directly present the important question last stated."

In that case both this court and the circuit court, presided over by Mr. Justice Brewer, in the trial of the case, were careful to frame the decree so as not to prevent the board of transportation from putting into effect the rates established by the act or permitted by it, when circumstances might so change as to make such rates reasonable and just to the railroads as well as to the public. In treating of this feature the court said:

"In anticipation, perhaps, of such a change of circumstances, and the exceptional character of the litigation, the circuit court wisely provided in its final decree that the defendants, members of the board of transportation, might, 'when the circumstances have changed so that the rates fixed in the said Act of 1893 shall yield to the said companies reasonable compensation for the services aforesaid,' apply to the court, by bill or otherwise, as they might be advised, for a further order in that behalf. Of this provision of the final decree the state board of transportation, if so advised, can avail itself. In that event, if the circuit court finds that the present condition of business is such as to admit of the application of the statute to the railroad companies in question without depriving them of just compensation, it will be its duty to discharge the injunction heretofore granted, and to make whatever order is necessary to remove any obstruction placed by the decrees in these cases in the way of the enforcement of the statute."

Afterward, in the same case, on an application for a rehearing, in 171 U. S. 361, the court said:

> "The court is of opinion that the present application by the appellants in each of the above cases should be granted. The general question argued before us on the original hearing was, whether the rates established by the Nebraska statute, looking at them as an entirety, were so unreasonably low as to prevent the railroad companies from earning such compensation as would be just, having due regard to the rights, both of the public and of the companies. In our examination of that question it was appropriate and necessary to inquire as to the earnings of the respective companies under the rates which they had established, looking at those rates, also, as an entirety. In this way we ascertained the probable effect of the statute in question. We did not intend, by an affirmance of the several decrees, to adjudge that the railroad companies should not, at any time in the future, if they saw proper, reduce the rates, or any of them, under which they were conducting business at the time the final decrees were rendered, nor that the state board of transportation should not reduce rates on specific or particular articles below the rates which the companies were charging on such articles when the decrees were entered. It may well be that on some particular article the railroad companies may deem it wise to make a reduction of the rate, and it may be that the public interests will justify the state board of transportation in ordering such reduction. We have not laid down any cast-iron rule covering each and every separate rate. We only adjudged that the enforcement of the schedules of rates established by the state statute, looking at such rates as a whole, would deprive the railroad companies of the compensation they were legally entitled to receive. We did not pass judgment upon the reasonableness or unreasonableness of the rates on any particular article prescribed by the statute or by the railroad companies. If the state should, by statute or through its board of transportation, prescribe a new schedule of rates, covering substantially

all articles, and which would materially reduce those charged by the companies, respectively, or should, by a reduction of rates on a limited number of articles, make its schedule of rates, as a whole produce the same result, the question will arise whether such rates, taking into consideration the rights of the public, as well as the rights of carriers, are consistent with the principles announced by this court in the opinion heretofore delivered. Of course, the reasonableness of a schedule of rates must be determined by the facts as they exist, when it is sought to put such rates into operation."

On the remanding of this case to the circuit court, acting upon this authority, the board of transportation gave notice and made orders directing various railroads to show cause why certain specific rates should not be, by a certain time, established. On an application for a temporary injunction (100 Fed. 235), and afterward appealed to the Circuit Court of Appeals (102 Fed. 197), where the case appears as Higginson v. Chicago, B. & Q. R. Company et al., Judge Thayer, speaking for the court, said, in denying the injunction:

"The orders which have been made by the state board of transportation are merely tentative. They do not establish a schedule of freight rates, and require the same to be put in force immediately, but simply direct the various railroad companies to show cause why certain rates should not be established. No reason is perceived why the companies against whom the orders run should be relieved by injunction of the duty of appearing before the board and disclosing to that public body the reasons which they may have to present why the board should not further proceed with the contemplated hearings, or why the proposed schedule of rates is unjust or unreasonable, if the board determines to proceed with the hearing. No harm can result to the appellants from taking such action, and a court of equity should not relieve them from the performance of that duty, un-

> less it clearly appears that the board of transportation, under existing laws, has no power to enter upon the hearing, or to consider whether existing rates are reasonable or unreasonable, or to make any orders with relation thereto."

In Railroad v. Minnesota, 134 U. S. 418, the rate had been established, and, upon writ of error, jurisdiction was assumed wholly upon the ground that the state court had refused to consider the reasonableness of the rate thus established, and as to whether it did or did not operate to deprive the railroads of the use of their property. It is decreed in that case that, while the courts have no concern with the fixing of a rate, they will exercise jurisdiction to determine whether a specific rate operates to deprive a person of property without due process of law, or denies to him the equal protection of the law, but that with the determination of this question the function of the court ceases. It will not enter into a consideration, either prospectively or retrospectively, as to what will be or what might have been a just and reasonable rate. It acts only on the question as to whether the rate complained of is just and reasonable.

In San Diego Land & Town Company v. National City, 174 U. S. 739, certain rates of a water company, fixed under the laws of the state of California, were alleged to invade the property rights of the plaintiff, as guaranteed by the Fourteenth Amendment of the Federal Constitution. In the opinion of the court, delivered by Mr. Justice Harlan, reviewing all of the rate cases, in speaking to the question of the extent of judicial interference in such matters, it is said:

> "But it should also be remembered that the judiciary ought not to interfere with the collection of rates established under legislative sanction, unless they are so plainly and palpably unreasonable as to make their enforcement equivalent to the taking of

property for public use without such compensation as, under all the circumstances, is just both to the owner and to the public; that is, judicial interference should never occur unless the case presents, clearly and beyond all doubt, such a flagrant attack upon the rights of property, under the guise of regulations, as to compel the court to say that the rates prescribed will necessarily have the effect to deny just compensation for private property taken for the public use (citing cases). In view of these principles, can it be said that the rates in question are so unreasonable as to call for judicial interference in behalf of the appellant? Such a question is always an embarrassing one to a judicial tribunal, because it is primarily for the determination of the legislature, or of some public agency designated by it. But when it is alleged that a state enactment invades or destroys rights secured by the Constitution of the United States, a judicial question arises, and the courts, Federal and state, must meet the issue, taking care always not to intrench upon the authority belonging to a different department, nor to disregard a statute unless it be unmistakably repugnant to the fundamental law."

In L'Hote v. New Orleans, 177 U. S. 587, involving the right of the city of New Orleans to prescribe, by ordinance, limits within which the lewd women of the town should dwell, Mr. Justice Brewer, in delivering the opinion of the court, said, in reference to the manner in which the questions litigated were brought to the attention of the court, that:

"It is well, in the first place, to look at the negative side, and see what is not involved."

And to a claim that the establishment of the limits operated to put a pecuniary loss upon the property in and adjacent to the limits, said:

"The truth is, that the exercise of the police power often works pecuniary injury, but the settled rule of

this court is that the mere fact of pecuniary injury does not warrant the overthrow of legislation of a police character."

The case of Williams v. Mississippi, 170 U. S. 213, was, in its essential feature, not unlike the case at bar. In that case it was contended that the plaintiff was denied the equal protection of the laws of the state of Mississippi by a provision of the state Constitution and laws discriminating against colored persons in regard to their right to vote and sit upon juries. Many acts of discrimination were alleged in the bill as being possible of accomplishment under the law; but this court, upon writ of error, in an opinion delivered by Mr. Justice McKenna, held that such criticisms and possibilities of accomplishment did not operate to make the law invalid; that the law, on its face, did not deny to colored persons the equal protection of the laws, nor did it discriminate against them. Although the discretion which it vested in certain officers might be abused to the abridgment of the right of colored persons to vote and serve on juries, yet, before the court could take cognizance of this, it must be shown that the law, either upon its face, has such an effect, or that the actual administration of the law has such an operation.

In the case at bar, however, the act of March 10, 1900, operates to vest in the board of railroad commissioners only that power which is universally conceded to be within the exercise of the police power of the state, either directly by the legislature or through some other instrument. It can not be said that, in and of itself, it operates even to affect the railroads, much less to deprive them of any of their property or its use. This could not be approached until some rate is fixed, yet before this is done, and even without any claim that the law will certainly be misused or abused, these important functions of the state are suspended by injunction.

In the case of Trammel v. Dinsmore, 102 Fed. 800, the Circuit Court of Appeals for the Fifth Circuit, speaking through Circuit Judge McCormick, said:

> "The formation of a tariff of charges for the transportation by a common carrier of persons or property is a legislative or administrative, rather than a judicial, function. The courts are not authorized to revise or change the body of rates imposed by the commission. They do not determine whether one rate is preferable to another, or what, under all circumstances, would be fair and reasonable as between the carriers and the shippers. They do not engage in any mere administrative work. There can be no doubt of their power and duty to inquire whether a body of rates prescribed is unjust and unreasonable, and such as to work a practical destruction to rights of property, and, if found so to be, to restrain its operation."

In the case of Southern Pacific Company v. Board of Railroad Commissioners, 78 Fed. 236, Mr. Justice McKenna, then circuit judge, delivered an elaborate opinion, reviewing a multitude of authorities, and passed upon a multitude of questions with reference to the power of states, in the matter of the regulation of rates of common carriers and the powers of the courts to pass judgment upon the reasonableness of the rates fixed. In that case, as in all of the cases which have been reviewed by the Supreme Court, the jurisdiction of the court was not invoked or exercised until after a rate had been fixed. It was contended in that case, on behalf of the railroad commissioners, that they were not amenable to restraint from the court before a schedule was prepared and served, because its functions were legislative, and not after a schedule was prepared and served, because their legislative function had been discharged and their acts were law, the enforcement of which must be restrained, if at all, by suits against other officers than them. In that case, how-

ever, the statute expressly delegated to the railroad commissioners the power and duty not only of making and changing the rate and revising it, from time to time, but also the right, power and duty of enforcing their own orders and decisions, both directly, as far as power was conferred, and, in addition thereto, through the medium of the courts. (See the case, page 244.) In regard to enforcing the rate after it has been fixed, that case differs from the case at bar. According to our reading of the decisions, it is this function of enforcing the rate that has been fixed that makes the board or public officer charged with the duty amenable to the process of the court. In the case referred to, it was not necessary for the court to pass upon the power of the court to restrain the making of a rate, as that feature was not presented. In considering the argument, however, that was advanced, Judge McKenna uses this language, on page 245:

> "In support of this contention a great many cases have been cited and reviewed, which I need not comment upon. They, undoubtedly, decide that the purely legislative functions of any official body can not be controlled by the courts, but in the case of railroad commissioners the Supreme Court of the United States has distinguished executive from legislative functions, and has asserted the power to restrain the latter when their attempt is to enforce a tariff of rates which may be unjust and unreasonable."

And again, in quoting from the opinion of Mr. Justice Brewer, in the case of Reagan v. Trust Company, 154 U. S., and drawing a deduction therefrom, the opinion says, on page 246:

> "As we have seen, it is not the function of the courts to establish a schedule of rates. It is not, therefore, within our power to prepare a new schedule or re-arrange this. Our inquiry is limited to the effect of the tariff as a whole, including therein the

rates prescribed for all the several classes of goods, and the decree must either condemn or sustain this act of quasi legislation.

"We are brought back to the inquiry concerning the duties which are devolved on the board of commissioners, and these, we have seen, are not only to enact provisions of regulation of rates, but to enforce them: and hence, certainly, when the former is done and the latter is threatened, the courts have power to review the regulation, and, to use Justice Brewer's words, 'condemn or sustain this act of quasi legislation.'"

In the case of Railroad v. Dey, 35 Fed. 866, the question was raised with reference to the rate law of Iowa as to whether the railroad commissioners could be enjoined from putting into force and operation the rate which they had made. It is there decided, by Mr. Justice Brewer, that enjoining the railroad commissioners from enforcing an unreasonable rate which they had established was not the equivalent of the exercise of the jurisdiction to restrain the prosecution of criminal laws, and that such a case was not within the principle of the case of ex parte Sawyer, 124 U. S. In that case, the jurisdiction was placed, as it has been according to our reading of all the cases, upon the ground that the railroad commissioners, in attempting to enforce an unlawful and illegal rate, were performing an unlawful act, to the invasion of the property and rights of the complainants.

We do not desire to be understood in the contention herein made as gainsaying any of these well-established principles, but contend that the case at bar is not within these rules, as the rate had not been fixed, and as the Kentucky railroad commissioners are not charged with the duty of enforcing the rate after it is fixed. They do have a continuous duty to perform with reference to the making of rates—that is, they are charged with the duty of changing it, from time to time, so that at all times it will be reasonable and just to both the railroad and the

public. This duty, however, we think, is purely legislative, or, at least, is so clearly allied to it that it should follow that a different department of the government, which has and can have no voice in the making of a rate, should not interfere.

The case of Southern Pacific v. Board of Railroad Commissioners, 87 Fed. 21, has some bearing upon this principle. In that case, allegations and charges were made, based upon what the board intended to do. In speaking to this point, the circuit court (Judge Morrow) there said:

> "The proceedings of the board in dealing with the resolutions appear to be, under the circumstances, relevant and material, but I can not see how the intention of the board can be considered relevant. The court will consider what the board did, but not what it or its members intended or threatened to do in the future."

In the case of Western Union v. Myatt, 98 Fed. 335, the Kansas law establishing a court of visitation and delegating to it the power to fix and regulate and enforce maximum rates for various public services, among them telegraphic services, was before the Federal Circuit Court. The main contention there was, on application for a temporary injunction, to prevent the enforcement of a schedule of rates alleged to be unreasonable, was as to whether all that was done or could be done under the act was absolutely void, because it attempted to confer upon a legislative body judicial power. The circuit court, in a well-considered opinion, held the law to be invalid, because it not only delegated to the board of commissioners legislative power, with reference to the making of rates, but created it a judicial tribunal, with full power to pass upon and enforce, as a court, what it had established as a rule of conduct. It is there decided that the function of such a board in establishing a rate is legislative, but that a

function in passing judgment upon and enforcing the rate which it has established by its own decrees is judicial, a confusion of power prohibited by the state constitution. On page 341, the court says:

> "The exercise by the state of the power to regulate the conduct of a business affected with a public interest, and to fix and determine, as a rule for future observance, the rates and charges for services rendered, is wholly a legislative or administrative function. The legislature may, in the first instance, prescribe such regulations and fix definitely the tariff of rates and charges; or it may lawfully delegate the exercise of such powers, and frequently does, in matters of detail, to some administrative board or body of its own creation. The establishment of warehouse commissions, boards of railroad commissioners, and the powers usually committed to them, are familiar instances of the delegation of such powers. But by whatever name such boards or bodies may be called, or by what authority they may be established or created, or, however they may proceed in the performance of their duties, they are, in respect of the exercise of the powers mentioned, engaged in the exercise of legislative or administrative functions as important in their character as any that are committed to the legislative branch of the government on the subject of property and property hights."

Again, on page 342, it is said:

> "Concisely stated, to prescribe a tariff of rates and charges is a legislative function; to determine whether existing or prescribed rates and charges are unreasonable is a judicial function. That this is the settled doctrine in this country is no longer open to question. It is firmly fixed in the body of our jurisprudence. Reagan v. Trust Co., 154 U. S. 362, 14 Sup. Ct., 1047, 38 L. Ed. 1014; Smyth v. Ames, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. Ed., 819. It follows, therefore, as a corollary of this doctrine, that courts have no power to prescribe a schedule of rates and charges for persons engaged in a public or quasi-public serv-

ice, because that is a legislative prerogative, and that the legislature has no power to forestall the judgment of the courts by declaring that a tariff or schedule prescribed by it is a finality, and thus prevent an inquiry into the reasonableness thereof by the courts in a controversy properly challenging such reasonableness. The legislative prerogative is the power to make the law, to prescribe the regulation or rule of action. The jurisdiction of the courts is to construe and apply the law or regulation after it is made. The two functions are essentially and vitally different."

And again, on page 360, in laying down the conclusions of the court:

"The distinction between legislative and judicial functions is a vital one, and it is not subject to change or impairment either by legislative act or by judicial decree, for such distinction inheres in the constitution itself, and is as much a part of it as though it were definitely defined therein. When the legislature has once acted, either by itself or through some subordinate board or agency, and has prescribed a tariff of rates and charges, then whether its action is violative of some constitutional safeguard or limitation is a judicial question, the determination of which involves the exercise of judicial functions. The question is then beyond the province of legislative jurisdiction."

A similar conclusion was reached by the Supreme Court of the state in State v. Johnson, 60 Pac. 1068. In speaking of these duties as comprehending a delegation of legislative power, we do not desire to be understood to contend that there is delegated to such a board an absolute discretion as to what the law shall be. On the contrary, the law, as passed by the legislature, fixes absolutely the rule for the government of the board.

In the case at bar, the rule for the guidance of the board is that the rate fixed by it shall be just and reason-

able and shall prevent the exaction of extortionate rates by the railroads. When this rate is fixed, the rule, which before was uncertain, is made certain and definite. That such power is legislative, but yet may be conferred on an administrative board is universally conceded. In addition to the above cases on this point are:

> Tilley v. Railroad, 5 Fed. 658-9, and authorities there cited.

In that case, the contention was made that the delegation of power by the Legislature of Georgia to a board of commissioners to fix rates was void, but it was held to be not only a valid but the most convenient and satisfactory method of performing this function of government. See also:

> Starrs v. Railroad, 11 S. 227, 29 Fla. 617.
> Railroad v. Jones, 149 Ill. 378.

The only case brought to our notice where a court has exercised its jurisdiction to issue a writ of injunction against a board of railroad commissioners before the rate was fixed is:

> Louisville & Nashville R. R. Co. v. Railroad Com. of Tennessee, 19 Fed. 679.

In that case, the Tennessee law did not itself fix a schedule of rates, nor did it confer authority upon the railroad commission to fix a schedule of reasonable maximum rates which, if complied with, would protect the railroads, but provided that the railroad commission should have revisory power over the rates of all railroads and should give its approval to the rates, when found to be just and reasonable, and if unjust or unreasonable should determine what reduction was necessary to make them a reasonable compensation and should notify the company and enforce the reduction accordingly. The law further

provided that, notwithstanding the railroad should thus comply with the revisions of the commission, if the rate so revised was still unreasonable, the railroad should be subjected to the penalties pronounced by the statute. In that case, upon the giving of notice to the Louisville Company of the intention of the commission to revise its tariff, the bill was filed in the Federal Circuit Court, and a temporary injunction was granted. It does not appear from the opinion, either of Judge Baxter or Judge Hammond, in that case that the jurisdictional question here contended for was raised. The injunction as granted by Judge Baxter, principally on the ground that the entire act was void, because the rate established under it was not binding upon the commission or the state, through it, and, though it was to be observed by the railroad, it afforded the railroad no protection; that it discriminated against railroad corporations by imposing penalties not imposed upon other persons operating railroads, and discriminated in favor of railroads not completed; that it inflicted penalties without defining the offenses, and left to the juries to determine whether the difference in rates amounted to discrimination or whether the rates were unreasonable. The decision of Judge Hammond was mainly put upon the invalidity of the statute, because it was a regulation of interstate commerce. That case, however, is relied upon as a precedent to sustain the jurisdiction over the case at bar. It does not discuss nor decide the point here raised.

It may be contended by the appellees that the Kentucky commission should not be permitted to proceed, because the bills, which are taken as confessed, allege that any reduction upon the rates would make them unreasonable.

In this regard, the allegations of the bills are as follows:

> "All of your orator's rates charged, collected or received within the state of Kentucky, are just and

> reasonable, and have not been sufficient for many years to give it a fair return upon the reasonable value of its investment."

These and other allegations of like import do not come to the statement of any fact, but state only conclusions of law. Even if they could be treated as allegations of fact, and as alleging that the schedule of rates in vogue, as a whole, is just and reasonable, it does not follow that the particular items may not be regulated.

> Smyth v. Ames, 169 U. S. 466.
> Higginson v. Railroad, 171 U. S. 361.

In the case of Reagan v. Trust Company, 154 U. S. 362, where the answer was withdrawn by the commissioners and a demurrer interposed, but where the specific facts showing the unreasonableness of the rate appeared, this court, in addressing itself to the subject of pleading in such cases, said, on page 401:

> "It may not be just to take this as an allegation of a mere matter of fact, the truthfulness of which is admitted by the demurrer, and which, as thus admitted, eliminates from consideration all questions as to the true character of the effect of the rates, yet it is not to be ignored. . . . It would not, of course, be tolerable for a court administering equity to seize upon a technicality for the purpose or with the result of entrapping either of the parties before it. Hence, we should hesitate to take the filing of the demurrers to these bills as a direct and explicit admission on the part of the defendants that the rates established by the commission are unjust and unreasonable."

The court then proceeds to consider, in extenso, the specific facts shown in that record, which prove the schedule of rates fixed to be unreasonable.

Upon the principles of the cases which we have above cited we contend:

1. That the making of a rate for the government of those in the discharge of a public service is a legislative function, which can be discharged immediately by the legislature, or more appropriately by it through an administrative board, and that to enjoin the making of a rate is to deny to the state this power of control, which is universally conceded.

2. Where the administrative board merely makes the rate, but is not charged with the power of enforcing compliance with the rate after it is made, a suit against such a board or its members, is a suit against the state.

Interstate Commerce.

It is claimed in the several bills that the act of March 10, 1900, is absolutely void, because it applies to and regulates interstate, as well as domestic, commerce, and so mixes the two that one can not be separated from the other, and thus the whole act must fall.

It is not claimed that the act expressly attempts to regulate extra-state or interstate commerce, but it is contended that it has this result, because it does not expressly confine its operation to domestic commerce—that is, to such commerce as has its origin and destination wholly within the territorial limits of the state of Kentucky. The language of the act is:

> "When complaint shall be made to the railroad commission, accusing any railroad company, or corporation, of charging, collecting or receiving extortionate freight or passenger rates, over its line or lines of railroad, in this Commonwealth, or when said commission shall receive information or have reason to believe that such rate or rates are being charged, collected or received, it shall be the duty of said commission," etc.

Under well-recognized principles for the construction of a statute, and the hesitation which the judiciary always

have in annulling a legislative act, we think that the act, upon its face, and without the light of other acts governing the railroad commission, should be construed as applying only to that subject matter over which the state has jurisdiction, to wit, domestic commerce. Even if it were doubtful as to whether the legislative intent was to regulate interstate commerce, in advance of a determination by the state courts that it shall have such operation, the Federal judiciary will construe the act as applying only to domestic commerce. It must be presumed that the legislature, even by the use of the most general terms, did not intend to exceed its jurisdiction. This court said in Munn v. Illinois, 94 U. S. 113, that, "every statute is presumed to be constitutional. The courts ought not to declare one to be unconstitutional unless it is clearly so. If there is doubt, the expressed will of the legislature should be sustained."

The functions of a railroad commission were deemed of sufficient importance by the people of Kentucky to provide therefor in the Constitution of the state, adopted September 28, 1891. (The sections referring thereto will be found in the appendix to this brief, as will, also, the general provisions of the statutes governing the commission.)

When the Act of March 10, 1900, is read in conjunction with Section 826, Kentucky Statutes, previously adopted, it is made patent that it was not intended by the later act to regulate the rates upon anything but domestic commerce.

Section 826 reads as follows:

> "Said commission shall examine all through freight rates from points out of this state to points into this state; and whenever they find that a through rate charged into or out of this state is excessive or unreasonable or discriminating in its nature, they shall call the attention of the railroad officials in this state to the

fact, and urge them of the propriety of changing such rates. And when such rates are not changed, it shall be the duty of said commission to present the facts to the Interstate Commerce Commission, and appeal to it for relief, and they shall receive upon application the services of the attorney general of this state and into the condition, management and all other matters concerning the business of railroads in this state so far as the same pertain to the relation of such railroads to the public, and whether such railroad corporations, their officers and employes, comply with the laws of the state; and whenever it shall come to their knowledge, or they shall have reason to believe, that the laws affecting railroad corporations in their business relations to the public have been violated, they shall prosecute, or cause to be prosecuted, the corporations or persons guilty of such violations."

By this section the duty of the commission, in reference to interstate commerce, was very clearly pointed out. The Act of March 10, 1900, was not intended to repeal Section 826. They are not inconsistent, but may stand together, as the full expression of the legislature's will as to the powers of the commission in reference to both interstate and domestic commerce.

Independent, however, of Section 826, it has been decided by this court that unless the state statute, upon its face, expressly relates to interstate commerce, or unless it has received a construction from the highest court of the state applying it to interstate commerce, it will be construed as relating to domestic commerce.

In the case of Stone v. Trust Company, 116 U. S. 307, it appeared that the commission law of Mississippi was much more indefinite than the Kentucky law. That law provided that any person or corporation engaged in transporting passengers or freight over any railroad in the state which should exact, receive or demand more than the rate provided for by the bill should be guilty of extortion. In holding this act not to be a violation of the in-

terstate commerce clause of the Federal Constitution, the court said:

> "It is not enough to prevent the state from acting, that the road in Mississippi is used in aid of interstate commerce. Legislation of this kind to be unconstitutional must be such as will necessarily amount to or operate as a regulation of business without the state as well as within.
>
> "The commission is not, in express terms, prohibited by the Act of March 15, 1884, from interfering with the charges of the company for the transportation of persons or property through Mississippi from one state to another. The statute makes no mention of persons or property taken up without the state and delivered within, nor of such as may be taken up within and carried without. As to this, the only limit on the power of the commissioners is the constitutional authority of the state over the subject. Precisely all that may be done, or all that may not be done, it is not easy to say in advance. The line between the exclusive power of Congress and the general powers of the state in this particular is not everywhere distinctly marked; and it is always easier to determine, when a case arises, whether it falls on one side, or the other, than to settle, in advance, the boundary, so that it may be in all respects strictly accurate. As yet the commissioners have done nothing. There is certainly much they may do in regulating charges within the state which will not be in conflict with the Constitution of the United States. It is to be presumed they will always act within the limits of their constitutional authority. It will be time enough to consider what may be done to prevent it when they attempt to go beyond."

The case of Wabash Road v. Illinois, 118 U. S. 557, is very much in point as to the Federal interpretation of the Act of March 10, 1900, standing alone. In that case, the state statute indicated that:

> "If any railroad corporation shall charge, collect or receive for the transportation of any passenger or

> freight, of any description, upon its railroad, for any distance within the state, the same or a greater amount of toll or compensation than is at the same time charged, collected or received for the transportation in the same direction of any passenger or like quantity of freight of the same class over a greater distance of the same road. . . ."

it shall be deemed and taken as prima facie evidence of an unjust discrimination, prohibited by the act and for which a penalty was imposed.

This act was interpreted, by the Supreme Court of the state, to prevent such discrimination, though the longer haul traversed parts of the same road through other states.

Peoples v. Railroad, 104 Ill. 476.
Railroad v. People, 105 Ill. 236.

The state court was reversed on writ of error. In passing upon the proper construction of the act, however, if the court had been relieved of the state's interpretation, Mr. Justice Miller said:

> "It might admit of question whether the statute of Illinois, now under consideration, was designed by its framers to affect any other class of transportation than that which begins and ends within the limits of the state. The Supreme Court of Illinois having, in this case, given an interpretation which makes it apply to what we understand to be commerce among the states, although the contract was made within the state of Illinois, and a part of its performance was made within the same state, we are bound, in this court, to accept that construction."

In a subsequent case before the Supreme Court of Illinois, Railroad v. Jones, 149 Ill. 384, prosecuted upon the same statute, the contention was made that the statute was void, because of the decision in 118 U. S., supra. In passing upon this contention, the state court calls attention

to the fact that, in the judgment of the Federal court, the act was void simply because of the interpretation placed upon it by the state judiciary, and then explains how the state court was led into that interpretation by decisions leaving it to infer that the matter there involved was within the jurisdiction of the state in the absence of congressional action upon the subject, and the court then states that if the case then under investigation arose upon the same section of the statute it would be inclined to hold, in view of the decision of the Federal Supreme Court, that their previous decision was incorrect, and thus let the section stand as a valid and enforceable section, applicable alone to domestic commerce; but the court was not compelled to this, because it held that the section involved in the 118 U. S. case could be eliminated from the statute and the balance of it stand; and it then construes the other sections of the same act to apply alone to domestic commerce.

The presumption of the validity of a state act is always indulged. In fact, as often announced by this court, the most delicate duty which the court has to perform is to declare an act of a co-ordinate branch of the government to be unconstitutional. This will never be done, except in a plain and manifest case. Every inference and indulgence is to be made in favor of the constitutionality of a legislative act. Remedial laws are always liberally construed to accomplish the purpose of the law-makers. In reference to legislation concerning rates, this court has repeatedly said that it would not hold a rate established either by the legislature, or by a commission under its authority, to be in violation of the Fourteenth Federal Amendment, unless it was shown to the exclusion of a reasonable doubt that the rate so established operates to deprive the railroad of its property, or of the equal protection of the laws.

Smyth v. Ames, 169 U. S. 466.
Reagan v. Trust Company, 154 U. S. 362.
Railroad v. Smith, 173 U. S. 684.
Railroad v. Wellman, 143 U. S. 339.
Southern Pacific v. Board of Railroad Com'rs, 78 Fed. 236.

In the rate case of Railroad v. Tompkins, 176 U. S. 173, Mr. Justice Brewer, speaking for the court, said:

> "In approaching the consideration of a case of this kind, we start with the presumption that the act of the legislature is valid, and upon any company seeking to challenge its validity rests the burden of proving that it infringes the constitutional guaranty of protection to property. The case must be a clear one in behalf of the railroad company, or the legislation of the state must be upheld."

Mr. Endlich, in his work on Interpretation of Statutes, Section 169, states the rule thus:

> "Another general presumption is that the legislature does not intend to exceed its jurisdiction. Primarily, the legislation of a country is territorial. The general rule is that extra territorium jus dicenti impune non paretur; leges extra territorium non obligant. . . . The presumption is that the legislature does not design its statutes to operate on them, beyond the territorial limits of its jurisdiction. They are, therefore, to be read, usually, as if words to that effect had been inserted in them."

A great number of decisions are cited to support the text.

The statute in question has not been interpreted by the Court of Appeals of Kentucky, and not by any state court, so far as we know. We submit, however, that on its face, and especially when construed, in pari materia, with the railroad commission statute, it is designed by the

legislature to apply only to domestic commerce, and that, even if there were a doubt upon the subject, that doubt must be resolved in favor of its constitutionality, in advance of a state interpretation, and be made to apply only to that over which the state has the right of government.

There seems to be an effort, however, in the bills of complaint, to charge that all of the commerce passing over the complainants' roads is interstate commerce. The charge is made that the railroads situated in Kentucky are but parts of other lines of railroad operated by the complainants, and further (we quote from the bill of the Louisville Company, pages 3, 4, which is a sample of the others):

> "Your orator carries a very large traffic over that part of its lines in the state of Kentucky, both passenger and freight, and both state and interstate, and about 80 per cent of such traffic passing over its lines in the state of Kentucky is interstate traffic in the strictest sense, and much of the remainder is virtually interstate traffic, the rates upon which have a direct and vital connection with the rates upon interstate traffic and a direct and far-reaching influence upon commerce among the states."

These allegations do not come to the point of denying that some part of the traffic of these roads is purely domestic commerce. We think that even if such an allegation were made, the court would take judicial cognizance that it must be essentially untrue. The Louisville Company is a corporation of Kentucky. The Henderson Company is a corporation of Kentucky, and begins and ends within the territorial limits of the state, and the Southern Company is a corporation of Kentucky. The allegations above quoted from the bills are evidently made with a view of attempting to bring all of the commerce upon the complainants' roads within the rule of

the case of Railroad v. Interstate Commerce Commission, 162 U. S. 184, and thereby to show that so much of said commerce, as has a connection with extra state lines of railroad through traffic arrangements and through bills, is within the control of the Interstate Commerce Commission, and, therefore, out of the control of the state commission. We deem it, however, not essential at present to consider the question, which sometimes becomes difficult of solution, as to where state commerce begins and interstate and foreign commerce ends, and the limitations and confines of each. These considerations, at present, would be but moot questions. They may become pertinent after the railroad commission has fixed a rate and the enforcement thereof is attempted. That there is an intrastate, or domestic, commerce, over which the state has control, is settled, we think, beyond further question.

Railroad v. Lander, 20 Ky. Law Rep. 913.
Railroad v. Mississippi, 133 U. S. 587; 5 L. R. A. 132.
Railroad v. Pennsylvania, 145 U. S. 192.
Tiedeman on State Control, 1056.
Plessy v. Ferguson, 163 U. S. 537.
Chesapeake & Ohio Ry. v. Kentucky, decided by this court in December, 1900.

This last case construed the separate coach law of the state of Kentucky providing for the separation of white and colored passengers into separate apartments to be constitutional. It was contended that this act was unconstitutional because, on the face of the act, the regulation was not confined to the territorial limits of the state and to domestic commerce. This contention was held to be well taken, in the Federal Circuit Court for the District of Kentucky, in the case of Anderson v. R. R., 62 Fed. 46. The terms of that act were more general than

the terms of the act on review in the case at bar, and did not expressly provide that such regulation should apply only to passengers taken up and set down within the territorial limits of the state.

The bills of complaint do not charge that there is not such a commerce which would be the legitimate subject matter of state control. That there may be an intimate connection between the state and interstate commerce, or that one may be effected by the other, is not sufficient.

In Stone v. Farmers Loan & Trust Co., 116 U. S. 307, this court distinctly held that although a road runs through several states, and forms a continuous line which is used for interstate commerce, it is none the less true that the corporation created by each state is, for all purposes of local government, a domestic corporation, and subject to regulation by the states respectively.

This court, in the cases of Smyth v. Ames, 169 U. S. 466, and Railroad v. Tompkins, 176 U. S. 167, and Reagan v. Trust Company, 154 U. S. 362, has decided that the state has a right to fix a rate for domestic commerce, but in doing so must fix it without relation to its intimacy with, or bearing upon, interstate or foreign commerce. The latter falls within the control of the national government, and the two must be kept separate and distinct. Each must bear its burdens and the reasonableness of its rate determined according to its own conditions.

In the opinion delivered by the circuit court, in the case at bar, it was held that the act could not be construed as applying to interstate commerce.

Judicial Power.

The complainants contend, and it was adjudged by the circuit court, that the act of March 10, 1900, is wholly invalid and in violation of the Fourteenth Amendment of the Federal Constitution, because,

1. It does not provide a judicial hearing for the rail-

road companies with reference to the rate which the commission is to fix; and,

2. The act confers upon the commission judicial powers, and the penalty of the rate to be fixed is the sequence of a judicial judgment that the railroad is guilty of extortion; and,

3. No sufficient notice to the railroad companies affected by the rate is provided for the fixing of the rate.

We do not think that any of these contentions is well taken. The contention that a judicial hearing is necessary to the fixing of a rate is based upon the authority of the case of Railroad v. Minnesota, 134 U. S. 418.

We do not understand that case to lay down this doctrine. Our interpretation of that case, and the cases which have followed it in this court, is, that the fixing or making of a rate is a legislative power, with which the courts have no concern, but that if a rate is made which is less than reasonable and just to the railroad, it amounts to an invasion of the property rights of said railroad, and violates the protection afforded by the Fourteenth Amendment. A rate unreasonable and unfair to a railroad comes, therefore, within the power of the judiciary whose peculiar function it is to protect property rights against such invasion. The doctrine of that case is that the courts do not concern themselves with the future regarding the rate, and will not, and have no power to, fix or make a rate, but that the reasonableness and fairness of a rate which has been made is the subject of a judicial investigation. The legislative department can not, by labeling a rate as fair and reasonable, deprive the court of the power of investigating the subject, and determining, for itself, that question. This is very far from reaching the contention of the complainants that a judicial investigation must precede the fixing of a rate. The doctrine of that case, as we understand it, is simply that the legislature has not the power to deprive the courts of an investigation, and that after a rate has been fixed, the

court may be appealed to and a trial may be had to determine its reasonableness, and a law which denies to a person the constitutional right to appeal to a court for such an investigation is, to that extent, unconstitutional and void. That case does not decide that, although the act may attempt to prevent such an investigation, if the courts of the state assume an investigation, the act would be declared void; but, on the contrary, it only holds that, where the courts of the state interpret the law and refuse to assert jurisdiction to investigate the reasonableness of a rate made, the Federal judiciary, on writ of error, will restrain the enforcement of the act as to the rate. In that case, a law of the state of Minnesota provided that all charges made by common carriers should be equal and reasonable, and all unequal and unreasonable charges were prohibited and declared to be unlawful, and, further, that each common carrier should print and copy for public inspection a schedule of the charges, which it had established, no more nor less than which schedule it should charge, and that this schedule could be changed only upon ten days' notice; and that it should also file copies of its schedule with the commission and should notify the commission of all changes, and that the commission should have the power, at any time, to change any part of the tariff or charges, so filed or published, found by it to be in any way unequal or unreasonable, and in such case should make, for the carrier, what it deemed to be a just and reasonable rate, and that this rate should be adopted, by the carrier, and no more and no less charged, and upon the failure of the carrier to put into force such a rate it should be subject to a writ of mandamus, to be issued by any judge of the Supreme Court, or of any district court, upon application of the commission, to compel compliance with the requirements of the act. The commission fixed a rate for the Chicago, Milwaukee & St. Paul Railway Company, the plaintiff in error, touching its milk traffic between

certain points, and upon its refusal to adopt the rate an action for a writ of mandamus was brought under the provisions of the act. In answer to the petition for the writ, the railroad responded, among other things, that the rate which the commission had fixed was unreasonable and amounted to a taking of its property without due process of law, and a violation of the guaranties of the Fourteenth Amendment. It was adjudged, by the Supreme Court of the state (38 Minn., 281), that the answer was insufficient; that the reasonableness of the rate was the subject of legislative, and not of judicial, investigation, and that the court had no power to go behind the finding of the commission. Upon writ of error to this court, it was held, Messrs. Justice Bradley, Gray and Lamar dissenting, that the question as to whether the rate was, or was not, reasonable was a judicial question, after the rate had been fixed, and that to deny such an investigation and enforce against a railroad an unreasonable rate, was a violation of the guaranties of the Fourteenth Amendment. It was not, however, ruled, nor, as we read the case, even intimated in any of the opinions, that the act was objectionable because it did not expressly provide for a judicial hearing, after the rate was fixed. On the contrary, the contention made in that case was that, under the act, what was tantamount to a judicial hearing was held by the commission before the rate was fixed, and that this was sufficient; but in answer to that contention this court held that the commission was an administrative board, and not a court, and that the provision for hearing, before the commission, with reference to the fixing of a rate, was not the equal of a judicial investigation, as to the reasonableness of the rate, after it had been fixed. Nor did this court, in that case, interpret the Minnesota statute as denying, or intending to deny a judicial hearing. On the contrary, in remanding the case, this court was careful to say that if the Supreme Court of the state would set aside its

ruling and admit the answer of the railroad, and afford it a judicial investigation, as to the reasonableness of the rate, the mandate of the court would be complied with. The language of the opinion of Mr. Justice Blatchford, speaking for the majority, is:

> "In view of the opinion delivered by that court, it may be impossible for any further proceedings to be taken other than to dismiss the proceedings for a mandamus, if the court should adhere to its opinion that, under the statute, it can not investigate judicially the reasonableness of the rates fixed by the commission. Still, the question will be open for review; and *the judgment of this court is, that the judgment of the Supreme Court of Minnesota, entered May* 4, 1888, *awarding a peremptory writ of mandamus in this case, be reversed and the case be remanded to that court, with an instruction for further proceedings not inconsistent with the opinion of this court.*

Again, in speaking of the action of the state court in refusing to hear the defense pleaded, Mr. Justice Blatchford said:

> "It deprives the company of its right to a judicial investigation, by due process of law, under the forms and with the machinery provided by the wisdom of successive ages for the investigation, judicially, of the truth of a matter, in controversy, and substitutes therefor, as an absolute finality, the action of a railroad commission, which, in view of the powers conceded to it by the state court, can not be regarded as clothed with judicial functions, or possessing the machinery of a court of justice."

Mr. Justice Miller, in a concurring opinion, set out his views in the form of ten propositions. The power of the legislature to exercise its function of fixing a rate, through a commission, was conceded, in the first and second propositions, and the balance of the opinion is, as follows:

"3. Neither the legislature, nor such commission acting under the authority of the legislature, can establish arbitrarily and without regard to justice and right a tariff of rates for such transportation, which is so unreasonable as to practically destroy the value of property of persons engaged in the carrying business, on the one hand, nor so exorbitant and extravagant as to be in utter disregard of the rights of the public for the use of such transportation on the other.

"4. In either of these classes of cases there is an ultimate remedy by the parties aggrieved, in the courts, for relief against such oppressive legislation, and especially in the courts of the United States, where the tariff of rates established either by the legislature or by the commission is such as to deprive a party of his property without due process of law.

"5. But until the judiciary has been appealed to to declare the regulations made, whether by the legislature or by the commission, voidable for the reasons mentioned, the tariff of rates so fixed is the law of the land, and must be submitted to both by the carrier and the parties with whom he deals.

"6. That the proper, if not the only, mode of judicial relief against the tariff of rates established by the legislature or by its commission, is by a bill in chancery asserting its unreasonable character and its conflict with the Constitution of the United States, and asking a decree of court forbidding the corporation from exacting such fare as excessive, or establishing its right to collect the rates as being within the limits of a just compensation for the service rendered.

"7. That until this is done it is not competent for each individual having dealings with the carrying corporation, or for the corporation with regard to each individual who demands its services, to raise a contest in the courts over the questions which ought to be settled in this general and conclusive method.

"8. But in the present case, where an application is made to the Supreme Court of the state to compel the common carriers, namely, the railroad

companies, to perform the services which their duty requires them to do for the general public, which is equivalent to establishing by judicial proceeding the reasonableness of the charges fixed by the commission, I think the court has the same right and duty to inquire into the reasonableness of the tariff of rates established by the commission before granting such relief, that it would have if called upon so to do by a bill in chancery.

"9. I do not agree that it was necessary to the validity of the action of the commission that previous notice should have been given to all common carriers interested in the rates to be established, nor to any particular one of them, any more than it would have been necessary, which I think it is not, for the legislature to have given such notice if it had established such rates by legislative enactment.

"10. But when the question becomes a judicial one, and the validity and justice of these rates are to be established or rejected by the judgment of a court, it is necessary that the railroad corporations interested in the fare to be considered should have notice and have a right to be heard on the question relating to such fare, which I have pointed out as judicial questions. For the refusal of the Supreme Court of Minnesota to receive evidence on this subject, I think the case ought to be reversed on the ground that this is a denial of due process of law in a proceeding which takes the property of the company, and if this be a just construction of the statute of Minnesota it is for that reason void."

This opinion of Mr. Justice Miller is quoted, in part, and approved by this court, speaking through Mr. Justice Shiras in the case of St. Louis & San Francisco Railway v. Gill, 156 U. S. 649.

As we understand these propositions, it is established that a judicial hearing is not necessary to precede the fixing of a rate, and that, in fact, the rate can be fixed without any notice or hearing, whatever. Nor is it intimated that the act must expressly provide that a judicial

hearing may be had after the rate is fixed. On the contrary, the courts have jurisdiction to grant this hearing by virtue of the Fourteenth Amendment and without any express grant of power by legislative act. It would result, therefore, that if nothing is said in the act, the courts of the state possessing equitable jurisdiction, like the circuit courts of the United States, would have jurisdiction to entertain a bill to restrain the commission from the enforcement of an unreasonable rate and, in such action, to investigate the reasonableness of the rate that was being enforced. It is moreover established by the third proposition that the rights of the railroad and the public with reference to the rate are correlative, and that the rate must be reasonable and just to both; that the public has as much right to complain of an unreasonably high rate, as the railroad has of an unreasonably low rate. It is further established that the question of the reasonableness, or unreasonableness of a rate can not arise until after the rate has been fixed. It then becomes, for the first time, a judicial question, to be determined by the courts. Mr. Justice Bradley dissented on the ground that the matter was wholly legislative, and that due process of law was satisfied in such matters, through legislative functions, and did not require the exercise of judicial functions, and that the courts were bound by the rate fixed. Mr. Justice Lamar and Mr. Justice Gray concurred with Mr. Justice Bradley in this view. All of the opinions agree, that neither notice nor judicial hearing is necessary to the fixing of a rate. There is no subsequent decision of this court, to which our attention has been called, laying down a contrary doctrine.

In the case of Fitts v. McGhee, 172 U. S. 516, it was held that a law of the state of Alabama fixing a toll rate for the Florence Bridge was not invalid or unconstitutional, and did not operate to confer even jurisdiction upon the Federal courts in advance of action in the state courts, because it provided for no judicial hearing as to

the rates fixed by the act. In that case it was decided that the proper method of raising all defenses under the Fourteenth Amendment was by pleading to indictments in the state court, or in the other penal actions that were brought, the unreasonableness of the rate, and that after testing the matters through the state court, a writ of error for review would lie from the Supreme Court of the United States; but that in advance of such procedure, although it might be convenient, no action in equity could be brought in the Federal Circuit Court. That the courts do not exercise jurisdiction regarding the making of a rate, but only assume jurisdiction as to the reasonableness of a rate that has been fixed and is complained of, is well established by the adjudications of this court.

Smyth v. Ames, 169 U. S. 466.
Reagan v. Trust Company, 154 U. S. 362.
Lake Shore v. Smith, 173 U. S. 684.
Railroad v. Gill, 156 U. S. 664.
Railroad v. Wellman, 143 U. S. 339.
Railroad v. Blake, 94 U. S. 180.
Munn v. Illinois, 94 U. S. 113.
Stone v. Trust Company, 116 U. S. 307.

These authorities all establish the proposition that the fixing of a rate is not judicial, and that a court, even in passing upon the reasonableness of a rate fixed, will not assume jurisdiction to say what would be a reasonable rate. The extent of the judicial power is to decide whether or not a rate which has been fixed and is complained of is reasonable.

The case of Budd v. New York, 143 U. S. 517, left a doubt as to whether there was some possible distinction between a rate fixed by the legislature and a rate fixed by a commission authorized by it, but this was soon dissipated; and the doctrine, as now firmly established, is that there is no distinction.

Railroad v. Gill, 156 U. S.
Reagan v. Trust Company, 154 U. S.
Smyth v. Ames, 169 U. S.
Lake Shore v. Smith, 173 U. S. supra.

Thus in the late case of Chicago, Milwaukee & St. Paul Railway Company v. Tompkins, 176 U. S. 167, court and counsel assumed the existence of the power in the legislature to fix rates through a commission. Under the law the commission made a schedule of rates, and the bill seeking to enforce the schedule was immediately filed. The sole ground for relief was the unreasonableness of the rates fixed by the commission. There was no question raised as to the authority of the commission to act. It may fairly be concluded from this that the doctrine is firmly established that the power which the legislature has to fix the rates for carriers may be exercised by it directly through an act, or indirectly through a commission created for the purpose.

As hereinbefore noted, in the case of Railroad v. Wellman, 143 U. S., Mr. Justice Brewer, delivering the opinion of the court, said:

> "The legislature has power to fix the rate for railroad charges for the transportation of passengers, and the extent of judicial interference is protection against unreasonable rates."

In Smyth v. Ames, 169 U. S. 528, this court, in an opinion delivered by Mr. Justice Harlan, said:

> "While rates for the transportation of persons and property within the limits of a state are primarily for its determination, the question whether they are so unreasonably low as to deprive the carrier of its property without such compensation as the Constitution secures, and, therefore, without due process of law, can not be so conclusively determined by the legislature of the state, or by regulations

adopted under its authority, that the matter may not become the subject of judicial inquiry."

To the same effect, see

Reagan v. Trust Company, 154 U. S. 362.
Railroad v. Gill, 156 U. S. 664.
Railroad v. Blake, 94 U. S. 180.
Munn v. Illinois, 94 U. S. 113.
Lake Shore v. Smith, 173 U. S. 684.
Stone v. Trust Company, 116 U. S. 307.
Starrs v. Railroad, 11 S. R. (Fla.), 226.
Georgia Railroad v. Smith, 128 U. S. 174.
Dow v. Beidelman, 125 U. S. 680.
Budd v. New York, 143 U. S. 517.
Lexington Turnpike v. Sandford, 164 U. S. 578.

In Railroad v. Gill, 156 U. S. 648, on writ of error to the Supreme Court of the state of Arkansas, where the legislature fixed the rate, in speaking to the question of a judicial hearing on the rate fixed, this court, in an opinion delivered by Mr. Justice Shiras, said:

"Sometimes, in acting on this subject, the state legislatures have created commissions of board of public works, with power to establish rates for the transportation of passengers and freight, and in such instances the course recommended by Mr. Justice Miller, already cited, may well be followed; that the remedy for a tariff alleged to be unreasonable should be sought in a bill in equity, or some equivalent proceeding, wherein the rights of the public as well as those of the company complaining, can be protected. But there are other cases, and the present is one, where the legislatures choose to act directly on the subject by themselves establishing a tariff of rates and prescribing penalties. In such cases there is no opportunity to resort to a compendious remedy, such as a proceeding in equity, because there is no public functionary or commission which can be made to re-

spond and, therefore, if the companies are to have any relief, it must be found in a right to raise the question of the reasonableness of the statutory rates by way of defense to an action for the collection of the penalties."

In that case the act did not provide for any judicial hearing. The railroad answered, alleging special facts, which it claimed operated to show that the rate fixed was unreasonable. A demurrer to this was sustained by the state court, and the railroad afterward offered to prove special facts to the same purport, but to which an objection was sustained. It did not thus appear that the state court had refused to receive a competent answer, or competent proof, going to sustain the defense of unreasonableness of rate, yet this court did not hold that such action by state authorities was a denial of a judicial hearing. On the contrary, this court held that neither the answer nor the proof offered to show that the rate was unreasonable, and concluded as follows:

"Upon the whole, we do not feel warranted, by all that appears in this record, in declaring invalid an act of the Legislature of Arkansas, which, on its face, appears to be a legitimate exercise of power, and which has not been shown, by clear and satisfactory evidence, to operate unjustly and unreasonably, in a constitutional sense, against the plaintiff in error."

In the case of Stone v. Trust Company, 116 U. S. 307, known as the Mississippi Railway Commission Cases, this court held that in the absence of a direct provision in the statute invading some constitutional right or privilege, the court would presume that the state authorities would obey the law, and would give the act such operation as would comply with constitutional limitations.

In Smyth v. Ames, 169 U. S., followed by Higginson v. Railroad, 171 U. S. 361, and in Reagan v. Trust Company, 154 U. S., this court, in passing upon the reasonableness

of a rate which had been fixed, limited its authority to pass upon the schedules of railroads, as a whole, and so framed the decree as not to prevent the state, or its commission, from fixing or making other rates, or from making rates as to particular items.

In Railroad v. Nebraska, 170 U. S. 57, in regard to apportioning against railroads, the costs of constructing and maintaining a railroad crossing, where it was claimed that the apportionment was invalid because made without notice, this court, in an opinion delivered by Mr. Justice Shiras, said:

> "Again, it is said that the apportionment made by the ordinance of the extent of the repairs, one-third to the plaintiff in error and two-thirds to the Union Pacific Railway Company, was arbitrary, without notice, and contrary to plain principles of justice and equality. But if, as we have seen, it would have been competent for the legislature to have put the burden of these repairs upon one of the parties, or to have apportioned them among the parties, as it saw fit, so it may make a due apportionment through the instrumentality of the city council. The latter was not directed to proceed judicially, but to exercise a legally delegated discretion."

In support of this, the opinion cites and quotes from the cases of

> State v. Railroad, 33 Kan. 176.
> N. Y. Health Dept. v. Trinity Church, 145 N. Y. 32.

In San Diego Company v. National City, 174 U. S. 740, it was contended that the state laws authorizing water rates to be established without previous notice to the corporation or persons immediately interested and without hearing, in any form, was invalid, because repugnant to the Fourteenth Amendment of the Federal Constitution,

and reliance for this position was mainly put upon the case of

Railroad v. Minnesota, 134 U. S.

In that case the law provided the time when the rate should be fixed. It was held in that case (Mr. Justice Harlan delivering the opinion of the court), that a hearing was not essential, but that as the statute fixed the entire month of February in each year as the time when the rates should be fixed by the municipal authorities, it was the duty of the water company to make its complaint, and that this was sufficient notice. In treating of this subject the opinion says:

> "If the state, by its Constitution or laws, had forbidden the city or its board to receive or consider any statement or showing made by the appellant touching the subject of rates, a different question would have arisen."

In that case, in the Federal court, the rate that was fixed was impugned. On this subject this court said, at the conclusion of the opinion:

> "It is sufficient to say that upon a careful scrutiny of the testimony our conclusion is that no case is made that will authorize a decree declaring that the rates fixed by the defendant's ordinance, looking at them in their entirety—and we can not properly look at them in any other light—are such as amount to a taking of property without just compensation, and, therefore, to a deprivation of property without due process of law."

In the case at bar the act does not preclude the complainants from being heard with reference to any rate that is to be fixed. On the contrary, it provides expressly that the railroad, whose rate is being considered, shall be notified and heard. The complaint of the bills, how-

ever, is that because the act provides that the notice may be served upon any officer or agent or employe that this is tantamount to no notice. The bills charge that a notice might be served upon a brakeman or switchman. This complaint, we think, is not germain to any of the cases now under consideration. In none of the bills do the complainants allege that with reference to the present proceeding of the board any notice has been served upon a brakeman or a switchman. On the contrary, each of the bills concedes the service of a notice upon a proper officer. At least, the notice that the commission would proceed was of sufficient character to precipitate the filing of the bills before the commission took any action. It is averred in each of the bills that the commission has "called for and obtained from your orator a list of rates fixed and charged by it." (See page 10, Louisville case.) A notice, in any form, is not essential, as the procedure in fixing a rate is legislative, and not judicial; but if a notice were necessary, we think it will be time enough to consider the objection that a notice might be served upon a brakeman when such service is made, and by virtue thereof the rate is fixed and complained of. If notice were required, and the statute permitted the latitude of notice charged in the bills, we think it is well established that the court would hold as void a notice served upon an officer, or an agent of such inferior grade, as not to amount to notice to the corporation; but would not, therefore, hold the entire act unconstitutional, or hold as unlawful proceedings upon proper service. The provisions of an act permitting such unlawful service could readily be removed from the act without impairing the operation of the remainder. Notwithstanding that the act might provide for fixing rates upon an insufficient or unreasonable service of notice, yet, if it should appear that the service of notice had been reasonable and sufficient, before action taken, in such a case the company would be estopped to complain on this ground. The shadowy as-

sumption that the commission may serve notice on a brakeman is not sufficient to justify the court in holding the law unconstitutional.

In Railroad v. Bristol, 151 U. S. 556, this court held that it can not proceed upon general ideas of the requirements of natural justice apart from the provisions of the Constitution supposed to be involved. The contention, however, of the complainants is that there is some natural right to a judicial hearing with reference to the fixing of a rate.

In Reagan v. Trust Company, 154 U. S. 395, this court said:

> "Courts are not authorized to revise or change the body of rates imposed by a legislature or a commission; they do not determine whether one rate is preferable to another, or what, under all circumstances, would be fair and reasonable as between the carrier and the shippers; they do not engage in any mere administrative work."

Again, on page 400, it was held:

> "As we have seen, it is not the function of the courts to establish a schedule of rates. It is not, therefore, within our power to prepare a new schedule, or rearrange this. Our inquiry is limited to the effect of the tariff as a whole, including therein the rates prescribed for all the several classes of goods, and the decree must either condemn or sustain this act of quasi-legislation. If a law be adjudged invalid, the court may not in the decree attempt to enact a law upon the same subject which shall be obnoxious to no legal objections. It stops with simply passing its judgment on the validity of the act before it. The same rule obtains in a case like this."

Again, in that opinion, it was held that the object of the legislature was the creation of a commission with power to fix rates, and that this was accomplished, whether the rates fixed were held conclusive or only

prima facie; that the provisions with reference to the penalty complained of as rendering the act unconstitutional might be dropped from the statute without affecting the validity of the remaining portions.

It is further contended by the complainants that the Act of March 10, 1900, in not providing expressly that the reasonableness of the rate fixed may be made the basis of a defense, to any indictment or proceeding had under the statute, virtually provides that the rate fixed shall be conclusive, and shall not be inquired into. As we have before seen, however, such a presumption, rendering the statute unconstitutional, will not be indulged. The statute does not so provide. It was not necessary that the statute should contain any provision on this subject. Its silence leaves the matter open to the full operation, through the judiciary, of all of the constitutional provisions, if the commission, in fixing the rate, should attempt their violation. In the absence of a direct provision that the rate fixed shall be conclusive and binding and not inquired into, the rate itself is prima facie evidence of its reasonableness. This much is indulged, out of that respect which one department of the government bears toward a co-ordinate department. If the act in question had, therefore, expressly provided that the rate, when fixed, should be only prima facie evidence of its reasonableness, there would be no ground for this contention, on the part of the complainants, yet, as we think, the absence of any statement on the subject has this operation and effect.

See Tiedeman on State and Federal Control of Persons and Property, Volume 1, page 313, and cases above cited.

Again, it is contended, and was so ruled by the circuit court, that the Act of March 10, 1900, confers upon the railroad commission judicial powers; that the commission first organizes as a court of justice, tries the railroad on a charge of extortion, and, if it should find the railroad

guilty, inflicts, as a penalty, its judgment making a reasonable rate—in the language of the opinion of the circuit court (page 24, record Louisville Company):

> "The legislature may delegate to a commission power to establish rates generally, but not the power to try an individual railroad for an offense and lower its rates alone, as the penalty of such conviction. The most prominent feature of this legislation is the manifest purpose, if possible, to regulate rates by severe punishments for single offenses, rather than by means of real attempts to solve the immense problem of fair and reasonable freight and passenger charges by industrious and earnest efforts to ascertain what they should be."

It would seem from the opinion that the objectionable feature of the act is that it requires the commission to investigate the matter of rates before it fixes a rate, at least, a commendable feature in both a legislative and administrative board, as shown by all the decisions. On the one hand, the contention seems to be that the act is void because it does not give a judicial hearing and notice in the fixing of a rate; and, on the other, that it is void because a trial precedes the fixing of a rate. It is not true that only judicial bodies exercise the functions of investigation and judgment. All legislation involves these classifications, and many executive, and even ministerial, acts require them. Any trial or investigation that precedes the making of a rate can not be a judicial investigation, within the meaning of the law, because it is an investigation looking not to an effect upon the past, but to the making of a rule for future conduct. Without reiteration, this distinction is established in all of the cases, many of which have heretofore been cited.

In the case of Western Union v. Myatt, 98 Fed. 341, heretofore cited, the rate act of Kansas was held to invade the Constitution, because it conferred upon the court of visitation, created by the act, as a judicial body,

legislative functions. In that case the court, in defining this distinction, said, on page 341:

> "In prescribing regulations or rules of action under the police power of the state for the safety and convenience of the public, or in determining a schedule of rates and charges for services to be rendered, they are in no sense performing judicial functions, nor are they in any respect judicial tribunals. The distinction between legislative and judicial functions is a vital one, and it is not subject to alteration or change, either by legislative act or by judicial decree, for such distinction inheres in the Constitution itself, and is as much a part of it as though it were definitely defined therein. When the legislature has once acted, either by itself or through some supplemental and subordinate board or body, and has prescribed a tariff of rates and charges, then, whether its action is violative of some constitutional safeguard or limitation is a judicial question, the determination of which involves the exercise of judicial functions. The question is then beyond the province of legislative jurisdiction. As applied to this case, the power of the state to fix or limit the charges of telegraph companies for transmission and delivery of telegraphic messages, is a legislative one, but whether the rates so fixed or limited are unreasonable to the extent that the enforcement of their observance would amount to a deprivation of the complainant of its property without due process of law, and a denial of the equal protection of the laws, and, therefore, violative of the first section of the Fourteenth Amendment to the Constitution, is a question for the courts."

And again, on page 345:

> "It was argued, at the bar, on behalf of the defendants, that the powers conferred upon the court of visitation are judicial in their character, for the reason that the law contemplates an investigation and consideration on the part of the court before final action is had; and it is particularly recalled

that such contention was made with reference to Paragraphs 8 and 9 of Section 8 of the act, which authorize the court of visitation to 'prescribe rules concerning the movements of trains to secure the safety of employes and the public, and to require the use of improved appliances and methods to avoid accidents and injuries to persons.' Investigation as a precedent to action is not exclusively an attribute of a judicial proceeding. Counsel confounds the usual legislative inquiry which precedes the passage of laws with the judicial consideration of a controversy in a court of justice. It certainly would not be claimed that the hearing and consideration by committees of legislative bodies of the views and opinions of men having special knowledge of matters to be effected by proposed legislation constitute, in any sense, the exercise of judicial functions, or that such committees are judicial tribunals. Nor does it follow that, because the exercise of the powers conferred upon the court of visitation requires the use of judgment and discretion, such powers are judicial in their nature, as that would make every executive act and legislative act, requiring judgment and discretion, a judicial act."

To the same effect was the subsequent decision of the Supreme Court of Kansas upon the same subject, in State v. Johnson, 60 Pac. 1068. In that case, Mr. Justice Johnson, in an able dissenting opinion, reviewing a great many authorities, held that the Kansas act did not create what is called the court of visitation, a judicial court, but made it only an administrative body, with quasi-judicial power, pertinent to confer upon such a body. Whatever may be said of the conflicting opinions regarding that statute, and as to whether judicial power was or was not conferred upon the board, it is sufficient to say that it radically differs from the statute now in question. Under the Kansas act, the board was, in every essential feature, constituted as a court with power to enter judgments, and to enforce its own judgments by sequestration of property and appointment of receivers.

In Railroad v. Board of Commissioners, 78 Fed. 258, heretofore referred to, the circuit court, speaking through Mr. Justice McKenna, said:

> "The objection that the provision of the California Constitution creating the board of railroad commissioners is invalid, because they do not require notice to the railroads, is certainly doubtful as law, if it be not disputable as a correct interpretation of those provisions."

Then, after reviewing the Minnesota case in 134 U. S., and holding that the majority opinion in that decision does not warrant such an inference, and that the concurring opinion of Mr. Justice Miller holds expressly that notice is not necessary, it continues, on page 260:

> "These views seem to satisfy all the purposes of the state, and all the rights of the railroads. The commission undoubtedly exercises a function which the legislature would otherwise exercise. It should be as full with the commission as with the legislature, and, in both, subject to the same judicial investigation, as we have already seen it is, and thereby giving to the railroads that protection to their rights and property which the constitution guarantees."

It was further held, in that case, in answer to the contention that the act was void because it did not provide for the fixing of reasonable rates, that in the absence of the word "reasonable," as a qualification of the rate to be fixed, the court would infer that the legislature intended reasonable rates.

In the case of Railroad Company v. Trammel, 53 Fed. 197, where the state law provided that the rate fixed should be *sufficient* evidence of its reasonableness, when questioned, it was held that in advance of state decisions denying the complainant an investigation on this subject,

the Federal court would not presume that the legislature meant to prevent judicial investigation.

The Interstate Commerce Commission, under the Act of Congress of 1887, is vested with many functions more nearly approaching judicial functions than any possible legislative function of fixing a rate, and yet that body has been held not to be a court, and not to possess the legislative power of fixing a rate.

Railroad v. Interstate Commerce Commission, 162 U. S. 184.
Interstate Commerce Commission v. Railroad, 167 U. S. 507.
Interstate Commerce Commission v. Railroad, 168 U. S. 144.

The investigation which the Kentucky commission is to hold, under the Act of March 10, 1900, is for the purpose of informing itself, so that a just and reasonable rate may be made. It proceeds in the same manner that a legislative committee would in ascertaining the facts necessary to enable it to act intelligently. It is not for the purpose of entering a judgment convincing the railroad of extortions, and then fixing a rate as a penalty. The only penalty which it can inflict, by the terms of the act in question, is the fixing of a reasonable rate. Of this the railroad companies have no legal right to complain. The interpretation of the act sought seems to us to be unwarranted. At least, under every state statute, as well as under the Act of Congress, where a railroad commission is organized and invested with the power of enforcing, fixing or regulating rates, it is also invested with power to investigate and hear evidence, and to inform itself, and is generally required so to do. Under none of the cases is the commission required to fix a rate simply for the purpose of fixing it. It will not be presumed that the commission will attempt to enforce the law so as to destroy or cripple the company. Under most

of the acts, where the act itself does not provide the rate, the commission is not authorized to make the rate or change it, except when the railroad is violating the conditions of reasonableness and fairness, in the tariff which it exacts.

In the opinion of Interstate Commerce Commission v. Railroad, 167 U. S. 493, Mr. Justice Brewer collated the provisions of the acts of many of the states touching upon this subject.

In State v. Wilson, 28 S. E. 554, it was held that the railroad commission, under the law of North Carolina, was not a court and did not have judicial powers, although the procedure much more nearly resembled a judicial procedure than that called for by the Kentucky act. In that case the court said:

> "Our conclusion is that the railroad commission does not stand upon the same footing as the criminal courts, inasmuch as it is an administrative, and not a judicial, court. While it was made by a subsequent statute a court of record, it was clearly the object of the act simply to give authenticity to its records and proceedings, as it added nothing to its duties or powers. It has been held to be a court of record in Atlantic Exp. Co. v. Wilmington & W. R. Co., 111 N. C. 463, 474; 16 S. E. 394; but, in the opinion of the court delivered by Chief Justice Shepherd, appears the significant qualification: 'Whether a court, having no power to enforce its judgment, fulfills the definition of a court of record and of general jurisdiction, is unnecessary to be considered.' The Supreme Court of the United States, in Reagan v. Trust Co., 154 U. S. 362, 397; 14 Sup. Ct. 1047, citing the Railroad Commissioner Cases, 116 U. S. 307; 6 Sup. Ct. 334, 348, 349, 388, 391, 1191, says: 'There can be no doubt of the general power of a state to regulate the fares and freights which may be charged and received by railroads or other carriers, and that this regulation can be carried on by means of a commission. Such a commission is merely an administrative board, created by the state for carrying into

effect the will of the state, as expressed by its legislature.'"

It is contended and intimated in the opinion that possibly the Act of March 10, 1900, was the result, or influenced by the decision, of the Court of Appeals in Louisville & Nashville Railroad Company v. Commonwealth, 99 Ky. 132, decided April 4, 1896. In that case the railroad was indicted and found guilty, in the trial court, of extortion, under Section 816 of the Kentucky Statutes, which reads as follows:

> "If any railroad corporation shall charge, collect or receive more than a just and reasonable rate of toll or compensation for the transportation of passengers or freight in this state, or for the use of any railroad car upon its track, or upon any track it has control of, or the right to use in this state, it shall be guilty of extortion."

On appeal to the Court of Appeals, the judgment of conviction was set aside, and this section was held unconstitutional, because, in the opinion of the court, until the state had fixed a reasonable rate, the railroad companies had no definite and certain standard according to which they could mould their conduct. It was held that while the common law and the statute fixed the rule at reasonableness, this was too indefinite and uncertain a rule to base a penal action upon—one jury might consider that reasonable which another jury might consider unreasonable.

The case of Railroad v. Dey, 35 Fed. 866, decided by Mr. Justice Brewer, was referred to in the opinion as being similar to the case then before the court, except that in the Federal case a schedule of rates had been fixed as reasonable, thus giving a certain standard for the guidance of the railroads.

The circuit court, in the case at bar, intimates that

the Act of March 10, 1900, is obnoxious, because it confers upon the railroad commission the power to fix the standard wanting in the section declared to be unconstitutional, and for this reason the act confuses judicial and legislative or administrative functions.

We confess that we are at a loss to reach the conclusion, even assuming the premises to be true.

It is again contended, and was held by the circuit court, that the Act of March 10, 1900, violates Sections 27 and 28 of the state Constitution, which provides as follows:

> "Sec. 27. The powers of the government of the Commonwealth of Kentucky shall be divided into three distinct departments, and each of them be confined to a separate body of magistracy, to wit: Those which are legislative, to one; those which are executive, to another; and those which are judicial, to another.
>
> "Sec. 28. No person, or collection of persons, being of one of those departments, shall exercise any power properly belonging to either of the others, except in the instances hereinafter expressly directed or permitted."

The Constitution also expressly provides for and creates the railroad commission, as shown by the sections printed in the appendix.

Section 218 of the Constitution, and Section 820 of the Kentucky Statutes, providing a penalty for charging a greater rate for a short haul than a long haul, under certain conditions, give to the railroad commission power to relieve the carrier from the operation of the section in special cases. This can only be done after a hearing and investigation, as extended and full as the commission deem necessary. We have here, by constitutional provision, so far as the state is concerned, a delegation of a power upon the railroad commission more nearly approaching judicial functions than any conferred by the

Act of March 10, 1900. The provisions regarding the long and short haul were enforced by the Court of Appeals in the case of Louisville & Nashville R. Co. v. Commonwealth, 46 S. W. 707.

As a Constitution can not be repugnant to its own provisions, it would seem that the Act of March 10, 1900, is not open to the objection that the railroad commission may discharge powers quasi-judicial in their nature.

Since Kentucky has existed as a state, county courts have discharged powers, both purely judicial and purely executive. Notwithstanding Section 28 of the Constitution, the county court, eo nomine, is created by the Constitution, and is vested with a mixture of such powers.

See Pennington v. Woolfolk, 79 Ky. 13.

In Stone, Auditor, v. Wilson, 19 K. L. R. 126, overruling Commonwealth v. Adams, 95 Ky. 589, it was held that a legislative act conferring upon the courts the authority to fix the fees to be received by certain executive officers, was not unconstitutional for the reason that it was an attempted delegation of legislative power to a judicial tribunal.

In Morton v. Woodford, 99 Ky. 367, it was held that the delegation of a power to a circuit court to establish towns under certain conditions is not a violation of the above provisions of the Constitution.

We, therefore, contend:

1. That the powers conferred upon the railroad commission by the Act of March 10, 1900, are purely legislative, or, at least, quasi-legislative, and that the nature of these powers is not changed because investigation and knowledge must precede their execution.

2. That it was not necessary, for the fixing of a rate or the discharge of any of the powers conferred under the act, that any notice should have been given to the railroads affected, but that the requirement of notice does

not render the performance of the functions unconstitutional.

3. If notice be required to render the statute constitutional, such notice is expressly provided by the act, and the fact that, in its latitude, notice may possibly be served upon some person, which would not be sufficient to give a court judicial power, can not operate to render the entire act unconstitutional. In such event, the act would only be unconstitutional when it was enforced through an invalid notice.

4. A judicial hearing is not required by any provision of the Federal Constitution to precede or attend the making of a rate.

5. The absence of an express provision in the act that the rate, when fixed, shall not be conclusive, or that the party charged with an observance of the rate shall have the right to appeal to the courts for relief against an unreasonable rate, is not necessary, and does not render the act unconstitutional. The absence of such a provision reads the Constitution into the law itself.

Arbitrary Power and Discrimination.

The next contention of the complainants is that the Act of March 10, 1900, is unconstitutional and void, as a whole, because it confers upon the railroad commission arbitrary power, especially in the fact that under it the commission may establish a rate upon particular articles and for each separate road. The act will permit different rates to be established by the commission against different railroads, but the commission, under the act, is not compelled to establish different rates, nor is it compelled to proceed against one road alone with reference to the establishment of a rate. From the bills it appears that it has made the same demand for schedule of rates from each of the complainants. This is doubtless a preliminary step to investigate all the rates alike. The act

makes it the duty of the commission to investigate specific complaints made as to rates, but at the same time gives to the commission the right to proceed, of its own motion, whenever it has information, or even reason to believe that the rate or rates which are being charged are extortionate.

It must be observed, however, that the aim of the act is to prevent extortion, and the limitation of the power conferred upon the commission is to make a rate which will be reasonable. The commission has no power to make an unreasonable rate, and we believe that the making of such a rate would be in violation of the express provisions of the act, in this regard protecting as fully the rights of the railroads as of the public. While a different rate may be established against different roads, the rule for the making of a rate is equal and uniform—that is, in every respect it must be reasonable. What may be a reasonable tariff for one railroad might be exorbitant for a second, and wholly insufficient for a third, under the rule established by this court in the cases of

Reagan v. Trust Company, 154 U. S. 362.
Smyth v. Ames, 169 U. S. 466.
Railroad v. Tompkins, 176 U. S. 167.
Turnpike v. Sandford, 164 U. S. 578.

If the law is equal and uniform, and applies to all falling within the same class, it is not, according to our understanding of the cases, open to the objection that it confers arbitrary power or unjustly discriminates against individuals, or violates the equality clause of the Fourteenth Amendment, even though, in its execution, differences may occur. If there were no statute on the subject, but the matter were left to the operation of the common-law rule, the same alleged discrimination that could be made, under the statute, would actually occur. At common law, a common carrier is only entitled to charge

a reasonable and fair compensation for the services required, and any excess could be recovered by the person employing the service.

Munn v. Illinois, 94 U. S. 113, and cases above cited.

The main object of having a maximum rate established is that, that which the common law leaves indefinite and uncertain, and to the determination of a jury, may be made certain and fixed, and that both the railroad and the public may have a fixed rule for the government of their conduct.

Since the advent of steam railroads, the common-law rule of leaving each individual shipper to adjust his rate with the railroad, according to what is fair and reasonable, has been found to be wholly impracticable, so that it may be said, we think with confidence, that a suit against a common carrier to recover an excess of a charge under the common law has hardly been heard of in the modern growth of railroads.

The Kentucky act does not provide that the rate which the commission is to establish shall be the rate which the railroads charge, as is provided in similar acts of many states. It only attempts to fix a maximum rate, and within the rate thus fixed it leaves the railroads to their own choice and selection.

The rule established by this court in a number of decisions, which will be cited, is that the rate which the railroad charges must be fair to the public as well as to the railroad. A railroad, being a public highway and performing a public service, is amenable to state control in this regard, and its rights and the rights of the public are correlative. A rate which would be unjust to the public, and more than reasonable compensation for the railroad, would be as much an infraction of the rights of the public as a rate which would be unjust to the railroad, and less than reasonable compensation for it would

impair its rights. The elements which control in the reasonableness of the rate fall under the same general rule, but yet vary with each railroad. Without attempting to give all of these elements, but naming only a few for illustration, we may say that the original cost of construction and equipment, considered with the present value of each, the capitalization and bonded indebtedness, considered with reference to the value of the stocks and bonds, and as to whether they have or have not been watered, the cost of maintenance and operation, considered with reference to whether the road is economically or extravagantly managed, form some of the bases from which the return due the road upon its traffic is to be based. The rule for the determination of this resultant fact is uniform and equal, but the fact determined will not be the same, because of the differences in the elements that go to make it up. The result is, that to have a uniform and equal rule, the resultant rate must necessarily be different for different railroads. Thus, a railroad constructed through a mountainous country, at great cost, must necessarily have a rate different from one with little or no fills or cuts, over a level country.

Again, railroads with the same cost of construction and equipment must have different rates, according to the population and character of business in the territory through which they operate.

The criticism, therefore, that different rates may be made by the commission against different railroads, instead of condemning the act, should be its commendation --the rule of the act being merely the rule of the common law, that in each and every case a just and reasonable rate shall be made.

To cite a concrete example, in reference to the Louisville Company: On its Cumberland Valley branch it charges a passenger tariff of four cents per mile. On its main line and branches it charges three cents a mile, and on its Mammoth Cave branch, which is patronized, in

the main, only by excursionists to Mammoth Cave, it charges a rate of ten cents per mile. In fairness to the railroad, it can not be said that the same rate should be charged on its Mammoth Cave branch which is charged on its main line. Upon these propositions, see

Smyth v. Ames, 169 U. S. 466.
Reagan v. Trust Company, 154 U. S. 362.
Railroad v. Gill, 156 U. S. 664.
Railroad v. Minnesota, 134 U. S. 418.
Railroad v. Iowa, 94 U. S. 155.
Peik v. Iowa, 94 U. S. 164.
Stone v. Trust Company, 116 U. S. 307.
Starrs v. Railroad, 11 S. 226.
Ruggles v. Illinois, 108 U. S. 526.
Budd v. New York, 143 N. Y. 517.

The circuit court, in the case at bar, seems to be of the opinion that the same rate must be fixed and applied to all railroads within the state, regardless of their conditions, circumstances, or the territory through which they operate, and for this reason the Act of March 10, 1900, was held to discriminate against the different railroads, and to confer arbitrary power upon the commissioners. It is said in the opinion (we quote from the record of the Louisville Company, R. 23):

> "If one railroad should be convicted by the commission of having been 'guilty of extortion,' and if a lower rate should consequently be fixed by it, such rate is prescribed for the guilty railroad alone, and for none of the others. The effect of the determination that the railroad has been guilty of extortion is individual. This being so, the others are still at liberty to charge, as proper, a rate which, if charged by the one thus convicted, would be deemed extortion, thus not merely inflicting a single penalty for a single offense, but placing the guilty railroad at the disadvantage of having a lower rate than its

> rivals, and depriving it of the equal protection of the laws. It can not be just; it can not be an equality of right or of protection for an act to be unlawful, if done by one railroad in Kentucky, and perfectly lawful if done by another railroad, in the same state."

The theory of the circuit court, we think, is contrary to the moving principle in the fixing of a rate, in all of the cases, which have been before this court, either on appeal or writ of error. The opinion assumes that the commission will fix the rate for one road, and then rest from its labors to enjoy the luxury of seeing that road suffer the penalty of lower rates, while the others revel in extortion. The command is to fix all rates for all roads; and the commission, it must be assumed, will comply with this command as speedily as possible.

In Railroad v. Iowa, 94 U. S. 155, it was held that classifications may be made according to the circumstances of the different railroads. It was there said:

> "It is very clear that a uniform rate of charges for all railroad companies in the state might operate unjustly upon some. It was proper, therefore, to provide in some way for an adaptation of the rates to the circumstances of the different roads; and the General Assembly, in the exercise of its legislative discretion, has seen fit to do this by a system of classification. Whether this was the best that could have been done is not for us to decide. Our province is only to determine whether it could be done at all, and under any circumstances."

In Turnpike Company v. Sandford, 164 U. S. 578, brought to this court on writ of error to the Court of Appeals of Kentucky, the very question now discussed was under consideration. It was there contended by the Turnpike Company that the Legislature of Kentucky had fixed for it a rate, but had not fixed a rate for other turnpikes, and that because thereof it was discriminated

against and denied the protection of the Fourteenth Amendment of the Federal Constitution. Mr. Justice Harlan, in delivering the opinion of the court in that case, upon this question, said, on page 598:

> "It is further insisted by the company that the rates prescribed for it by the Act of 1890 are much less than those imposed by the General Statutes of Kentucky upon other turnpike companies of the state; consequently, that that act denies to it the equal protection of the laws. The proposition of the defendant is, that the constitutional provision referred to requires all turnpike companies in the state to be placed by the legislature, when exercising its general power over the subject of rates to be charged upon highways of that character, upon substantially the same footing. Upon this point the Court of Appeals of Kentucky said: 'A turnpike road leading into and connected with a populous city like that of the city of Covington could afford to charge less toll by reason of the immense travel upon it, than turnpikes in thinly settled portions of the county or state, and hence under former Constitutions the legislature has seen proper to regulate the tolls as the turnpike road may happen to be located.' The circumstances of each turnpike company must determine the rates of toll to be properly allowed for its use. Justice to the public and to stockholders may require, in respect of one road, rates different from those prescribed for other roads. Rates on one road may be reasonable and just to all concerned, while the same rates would be exorbitant on another road. The utmost that any corporation, operating a public highway, can rightfully demand at the hands of the legislature, when exerting its general powers, is that it receive what, under all the circumstances, is such compensation for the use of its property as will be just, both to it and to the public. If the rates prescribed for the defendant in this case were manifestly much lower—taking them as a whole—than the legislature has, by general law, prescribed for other corporations whose circumstances and location are not un-

like those of the defendant, a different question would be presented. At any rate, no case of that kind is properly presented by the pleadings, and there is no ground for holding that the Act of 1890 denies to the defendant the equal protection of the laws."

In that case it was held by the state court, reported in 14 K. L. R., 689; 20 S. W. 1031, that the act did not violate any provision of the state Constitution, and it was held by this court, on writ of error, that the fixing of a rate against that turnpike *alone* did not violate any provision of the Federal Constitution. The state court was reversed, however, because it was held that the reduction of the rate was so great as to deny the turnpike a fair return on its property, and operated to compel the turnpike to do business at a loss.

To the same effect is the case of Commonwealth v. Covington & Cincinnati Bridge Company, 14 K. L. R. 836; 21 S. W. 1042, where the rate complained of specially applied to the Covington bridge. That case, on writ of error, was reversed in 154 U. S. 205, but solely on the ground that as the bridge was a link of communication between the state of Kentucky and the state of Ohio, the statute, in fixing a rate, regulated interstate commerce.

Nor is the Act of March 10, 1900, open to the criticism, in the opinion of the circuit court, that no standard is fixed for the control of the commissioners in fixing the rate, thereby giving them arbitrary power. Were the act silent upon this question, the constitutional limitation, that a reasonable rate was to be fixed, would be read into the act. Such is the ruling in a great number of cases heretofore cited in this brief, and which need not be here repeated.

In the case of Smyth v. Ames, 169 U. S., where the statute, as the act now in question, referred to reasonable maximum rates, this court observed, on page 527:

"Before entering upon its examination, it may be observed that the grant to the legislature, in the

Constitution of Nebraska, of the power to establish maximum rates for the transportation of passengers and freight on railroads in the state, has reference to reasonable maximum rates. These words strongly imply that it was not intended to give a power to fix maximum rates without regard to their reasonableness."

For the act in question to have laid down any other rule, it would necessarily have been compelled itself to name the rate, and, therefore, the duties of the commission, in that regard, would not have been needed.

Again, in the case of Smyth v. Ames, in speaking of the particular facts of each railroad with reference to which the rate must be fixed to be reasonable, whether applying to interstate or state commerce, the opinion (on page 540) says, quoting from the opinion of Mr. Justice Brewer, in 64 Fed.:

"(But they are not necessarily bound to give absolutely the same rates to the people of all the states), for the kind and amount of business, and the cost thereof, are factors which determine largely the question of rates, and these vary in the several states. The volume of business in one state may be greater per mile, while the cost of construction and of maintenance is less. Hence, to enforce the same rates in both states might result in one in great injustice, while in the other it would only be reasonable and fair. Comparisons, therefore, between the rates of two states, are of little value, unless all of the elements that enter into the problem are presented. It may be true, as testified by some of the witnesses, that the existing local rates in Nebraska are 40 per cent higher than similar rates in the state of Iowa. But it is also true that the mileage earnings in Iowa are greater than in Nebraska. In Iowa there are 230 people to each mile of railroad, while in Nebraska there are but 190; and, as a general rule, the more people there are the more business there is. Hence, a mere difference between the rates in two states is

of comparatively little significance." 64 Fed. Rep. 165. "In these views we concur, and it is unnecessary to add anything to what was said by the circuit court on this point."

And again, on page 547:

> "What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience. On the other hand, what the public is entitled to demand is that no more be exacted from it for the use of a public highway than the services rendered by it are reasonably worth. . . . On the contrary, we are of opinion that as to most of the companies in question there would have been, under such rates as were established by the Act of 1893, an actual loss in each of the years ending June 30, 1891, 1892 and 1893; and that, in the exceptional cases above stated, when two of the companies would have earned something above operating expenses, in particular years, the receipts or gains, above operating expenses, would have been too small to affect the general conclusion that the act, if enforced, would have deprived each of the railroad companies involved in these suits of the just compensation secured to them by the Constitution."

We think it is apparent from this decision that the condition of each road forms a separate and distinct basis with reference to the reasonableness of the rate to be fixed and that a rate can not be reasonable and fair, to both the railroad and the public, which applies to all railroads, regardless of their different conditions. In the case cited, the reasonableness of the rate was considered with reference to each road separately, and we believe the inference is justified that if the court had found the schedule of rates reasonable, with reference to any particular road, the injunction would have been denied to it, although granted to the others.

To the same effect is the case of Reagan v. Trust Company, 154 U. S., where the statute expressly required the

rate to be fixed with reference to railroads separately. (See Section 3, in the statement of the case, pages 362-3.)

In the acts in both of the cases cited, and also in the Minnesota act, in the Minnesota case, 134 U. S., the railroad commission was given the power to change and alter the rates, from time to time, a feature of the Kentucky Act of March 10, 1900, referred to in the opinion of the circuit court, as conferring arbitrary power, upon the commission. This same feature appears in the Act of Congress creating the Interstate Commerce Commission, but this court has never, so far as we are informed, found that such a provision, either in the Federal law, or in any state law, is open to objection. On the contrary, from the reasoning of the cases, it appears that some such elasticity, in the regulation of rates, is necessary to keep them, at all times, fair and reasonable. If the rate be fixed by the legislature, it must stand, if at all, until the next session of that body. What is reasonable and fair one year may not be such the following year. That the act may permit unjust discriminations under the powers conferred on the commission is no objection to the validity of the act, so long as it does not demand or authorize such discrimination. The possibility of such discrimination should have no more weight against the validity of this act than the possibility of an unjust enforcement, which pertains to every law. The law itself provides an equal and uniform rule for the making of a rate. It must be reasonable. The power conferred to alter or change the rate is only a provision to insure the establishment and maintenance of a reasonable rate at all times and under all circumstances for each road.

In Railroad v. Matthews, 174 U. S. 96, on writ of error to the Supreme Court of Kansas, the validity of an act of the legislature relating to liability of railroads for damage by fire was before this court. Mr. Justice Brewer, in delivering the opinion of the majority, said (page 104), after quoting from the case of Barbier v. Connolly, 113 U. S. 27:

"This declaration has, in various language, been often repeated, and the power of classification upheld whenever such classification proceeds upon any difference which has a reasonable relation to the object sought to be accomplished."

And again, on page 106:

"Indeed, the very idea of classification is that of inequality, so that is goes without saying that the fact of inequality in no manner determines the matter of constitutionality."

In Williams v. Mississippi, 170 U. S. 214, this court, speaking through Mr. Justice McKenna, in regard to a claim that the law of Mississippi discriminated against the negro race, distinguishing the case then before the court from the case of Yick Wo v. Hopkins, 118 U. S. 356 (which, most likely, will be relied upon by complainants in the case at bar), said (page 223):

"There is no charge against the officers to whom is submitted the selection of grand or petit jurors, or those who procure the lists of the jurors. There is an allegation of the purpose of the convention to disfranchise citizens of the colored race, but with this we have no concern, unless the purpose is executed by the Constitution or laws, or by those who administer them. If it is done in the latter way, how or by what means should be shown."

The court then ruled that the equal protection of the laws is not denied on the ground of unjust discrimination, simply because it grants a discretion to certain officers, which can be used to the abridgment of the right of an individual, unless it be shown that the actual administration of the law is to this effect, and is evil; but the possibility of an evil administration is no concern of the court.

In the Chinese Laundry case, 118 U. S., there was an actual purpose in the law to discriminate, and an actual

discriminating administration of that law. It conferred naked arbitrary power on a board of supervisors to say who should conduct business, without prescribing any qualifications whatsoever. The board might arbitrarily withhold its consent from one person and grant it to another under like circumstances. The law in question here, however, applies equally to all railroad corporations in the Commonwealth alike.

Sustaining the same principle, is the case of Grundling v. Chicago, by Mr. Justice Peckham, 177 U. S. 183, involving the Chicago cigarette license ordinance.

In Budd v. New York, 143 U. S. 517, the law of the state of New York, regulating the fees and charges of elevators and warehouses, applied only to those located in places which had a population of 130,000 or more, but it was held by this court that such a limited application did not amount to a discrimination which deprived the warehouses and elevators in such places of the equal protection of the laws.

In Dow v. Beidelman, 125 U. S. 680, this court, in an opinion delivered by Mr. Justice Gray, in treating of the contention that the rate law of Arkansas violated constitutional limitations in making an unjust discrimination, said:

> "The legislature, in the exercise of its power of regulating fares and freights, may classify the railroads according to the amount of the business which they have done or appear likely to do. Whether the classification shall be according to the amount of passengers and freight carried, or of gross or net earnings, during a previous year, or according to the simpler and more constant test of the length of the line of the railroad, is a matter within the discretion of the legislature. If the same rule is applied to all railroads of the same class, there is no violation of the constitutional provisions securing to all the equal protection of the laws."

Laws levying a tax on inheritances, graduated according to the value of the estate, and on lineal and collateral relationship to the testator or intestate, are held to be valid.

Magoun v. Trust Company, 170 U. S. 282.

Another contention of the bills of complaint is that the Act of March 10, 1900, is invalid because it does not apply to all common carriers, but applies only to railroads.

We do not think that this contention is forceful, in view of the many decisions of this court.

In Orient Insurance Company v. Daggs, 172 U. S. 560, it was held that a fire insurance company, under the law of the state of Missouri, was not denied the equal protection of the laws by a statute which was applicable only to fire insurance. In that case, in an opinion delivered by Mr. Justice McKenna, it is said on page 562:

> "It is not necessary to state the reasoning upon which classification by legislation is based or justified. This court has had many occasions to do so, and only lately reviewed the subject in Magoun v. Illinois Trust & Savings Bank, 170 U. S. 283 (42: 1037). We said in that case that 'the state may distinguish, select and classify objects of legislation, and, necessarily, the power must have a wide range of discretion.' And this because of the function of legislation and the purposes to which it is addressed. Classification for such purposes is not invalid, because not depending on scientific or marked differences, in things or persons, or in their relations. It suffices if it is practical, and is not reviewable unless palpably arbitrary. The classification of the Missouri statute is certainly not arbitrary."

In Railroad v. McKey, 127 U. S. 205, a law of Kansas abrogating as to railroads the rule of the common law exempting masters from liability to one servant for the

negligence of another, was sustained as a valid classification, notwithstanding that it was not applied to other carriers. In that case this court held that the law was not violative of the equality clause of the Fourteenth Amendment, "if all persons subject to it are treated alike under similar circumstances and conditions, in respect both of the privileges conferred and the liabilities imposed."

In Railroad v. Beckwith, 129 U. S. 26, a law of Iowa, making a class of railroad corporations for special legislation, was sustained.

In the case of Railroad v. Bristol, 151 U. S. 555, it was held that there is no unjust discrimination and no denial of the equal protection of the laws in regulations applicable to all railroad corporations alike.

Of like nature is the case of Railroad v. Humes, 115 U. S. 512, regarding the railroad fence laws of the state of Missouri.

In Cutting v. Stock Yards, 79 Fed. 679, a Kansas statute regulating stock yards was held not objectionable as class legislation because it applied only to stock yards doing a certain volume of business, as the law was uniform in its operation on all yards coming within the designated class.

In Bowman v. Lewis, 101 U. S. 22, a statute of Missouri was drawn in question. In four counties of the state appeals from the judgments of the circuit courts were allowed to the Court of Appeals. In all other counties appeals were allowed to the Supreme Court, which was also given appellate jurisdiction over certain judgments of the Court of Appeals. This court upheld the statute, and in the opinion said:

> "If diversity of laws and judicial proceedings may exist, in the several states, without violating the equality clause of the Fourteenth Amendment, there is no valid reason why there may not be such diversity in different parts of the same state. When part of a

> state is thickly settled, and another part has but few inhabitants, it may be desirable to have different systems of judicature for the two portions. It would be an unfortunate restriction of the powers of the state government if it could not, in its discretion, provide for these various exigencies."

Where the diversity pointed out by the court exists, as, for example, in a great state like Texas, is it not as needful for the state to possess the power to adjust the rates for different roads, existing and operating under diverse conditions, as it is to provide laws and judicial procedure for each locality? The power, in the opinion of this court, was left in the states to meet such exigencies.

Again, in Hayes v. Missouri, 120 U. S. 68, another statute of Missouri was considered and upheld by this court. The statute in question, in certain counties, allowed the state a certain number of peremptory challenges in criminal cases. In the other counties the state was allowed fewer challenges. A person tried and convicted in a county where the state was allowed the greatest number of challenges, complained that he was denied the equal protection of the law. Concerning this contention this court said:

> "The Fourteenth Amendment . . . does not prohibit legislation, which is limited either in the objects to which it is directed, or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed."

The railroad companies are only entitled to the equal protection of the law, in reasonable rates. They have no right to be protected in unreasonable rates. Neither

have they the right to have another company or companies protected in such unreasonable rates, in order that they may thereby maintain unreasonable rates for themselves. Consequently, the law which empowers the commission to investigate the rates and make them conform to the standard prescribed, operates on all alike who may be charging unreasonable rates.

In Missouri Pac. Railway v. Mackey, 127 U. S. 205, in reply to the contention that the law complained of only applied to railroads, the court said:

> "It is simply a question of legislative discretion, whether the same liabilities shall be applied to carriers by canal and stage coaches as to persons and corporations using steam."

To the same effect is Soon Hing v. Crowley, 113 U. S. 703. The contention in the bill (paragraph 6, page 8, R. Louisville case), that the appellees are denied the equal protection of the law, because the Act of March 10, 1900, only applies to "railroad companies or corporations," is untenable, because, under the law of Kentucky, a railroad can not be operated by a private person. Under Section 562, Kentucky Statutes, if a person should become the owner, at private sale or under judgment of a court, of the franchise and property of a railroad corporation, he is required to organize a corporation for the operation and management of such railroad. The organization of such corporation is provided for by Sections 538, 539, and 763, Kentucky Statutes.

It therefore follows that inasmuch as a railroad can only be operated, in Kentucy, by a company or corporation, there can be no discrimination under the statute against such companies or corporations.

The statutes of Kentucky requiring that railroads can only be operated by corporations, is declaratory of the law as announced in State v. Boston Railroad Co., 25 Vt. 433, where it was said that the "right to build and run a

railroad, and to take tolls or fares, is a franchise of the prerogative character, which no person can legally exercise without some special grant of the legislature."

The sections of the Kentucky Statutes referred to will be found in the appendix.

Upon the propositions here discussed, we, therefore, contend:

1. That the Act of March 10, 1900, does not confer arbitrary power upon the railroad commission, and does not provide for any arbitrary or unjust classification or discrimination in the making of rates.

2. If there be a possibility of an evil administration of this law, it is no more than can be said of any existing law; but the court will not, in advance of an administration of a law, assume a violation of public duty by public officers.

3. The rule of the act is to fix a reasonable rate which involves the correlative rights of the railroads and the public. That different rates may be made for different railroads under different circumstances is a result of the necessity of an equal and uniform law. The same rate for all railroads, regardless of circumstances, would, in many instances, be arbitrary and unjust, either to the railroad or the public.

4. Classification is not a denial of the equal protection of the laws, but is demanded in many instances by proper legislation, and railroads have always been held to constitute a separate and distinct class from other corporations.

Contract.

The questions heretofore discussed are common to all of the cases, but the questions under this heading of "Contract" apply only to the Louisville Company and the Cincinnati Company. With reference to each the question is different. The contract claimed

by the Louisville Company is prior to a general law of the state of Kentucky providing that all charters should be subject to alteration, amendment and repeal; and its charter makes no such provision. The charter of the Cincinnati Company contains a provision subjecting it to alteration, amendment and repeal, and was granted long after the existence of a general law upon that subject. We shall, therefore, consider the alleged contract of these two companies separately, first considering that of the Louisville Company, which presents the greater difficulty.

The contract of the Louisville Company is claimed under Section 18 of the Act of the State of Kentucky, approved March 5, 1850, entitled, "An act to charter the Louisville & Nashville Railroad Company." Said section reads as follows:

> "Section 18. That the president and directors shall have power to purchase, with the funds of said company, and place on any railroads constructed by them, under this act, all machines, wagons, vehicles or carriages of any kind, which they may deem proper, for the purposes of transportation on said road; and that they shall have power to charge for tolls, and the transportation of persons, merchandise, and property of any kind whatever, transported along said railway, any sum not exceeding the following rates, to wit, on all goods, merchandise or property, for every one hundred pounds transported over twenty miles and under fifty miles, three and a half mills for each mile; and for persons, and every species of live stock, and every other description of freight and property, they shall charge no greater rate than is authorized to be charged on the railway from Lexington to Frankfort; that it shall not be lawful for any other company, or any other person or persons, to travel upon or use any of the roads of said company, or to transport persons or property thereon, without the license and permission of the president and directors thereof; and that the said road or roads, with all their works, improvements or

profits, and all the carriages, vehicles and machinery for transportation used therein, and all other species of property thereunto belonging, are hereby vested in said company incorporated by this act, and their successors, forever; and shall never be taxed beyond the rate of tax imposed upon real estate, estimated upon the prime cost of the proposed works; nor will the legislature of this Commonwealth, for the space of thirty years, authorize any other railroad to be laid down on a parallel line with the one located by this company, extending from Louisville to the Tennessee line, approaching nearer than ten miles: Provided, full power is hereby reserved to this state to incorporate, hereafter, a company or companies to build a railroad or railroads, and that any and all such railroad or railroads, hereafter constructed, may connect and join with the road hereby contemplated; and full right and privilege is hereby reserved to the state, or individuals, or any company heretofore or hereafter incorporated by law of this state, to cross this road, provided any other railroad connecting with the road hereby provided for shall lead from the main route and diverge therefrom at an angle of twenty degrees or more: Provided, that in forming such connection, or in crossing said road, no injury be done to the works of the company hereby incorporated; and that nothing in this act shall be so construed as to deprive any subsequent legislature of the power to authorize the 'Kentucky and Mississippi Railroad Company' to extend their said road from Hopkinsville to Louisville, or of the power at any time hereafter of incorporating a company to construct a railroad from Louisville to some point upon the Mississippi river, in this state."

And Section 20 of an act approved February 28, 1848, incorporating the Lexington & Frankfort Railroad Company, referred to in the aforeaid section of the charter of the Louisville Company, reads as follows:

"Section 20. Be it further enacted, that the said board of directors shall have power to purchase, with the funds of said company, and place on any

railroad constructed by them, under this act, all machines, wagons, vehicles or carriages, of any description whatsoever, which they may deem necessary or proper for the purposes of transportation on said road, and that they shall have power to charge for tolls, and the transportation of persons, goods, produce, merchandise, and property of any kind whatsoever, transported by them along said railway between Lexington and the Kentucky river, any sum not exceeding the following rates, to wit, for transporting, any distance, single packages, weighing less than one hundred pounds, twenty-five cents; and at that rate, if such packages weigh more than one hundred pounds; for transporting goods, produce, merchandise, or property of any kind, not less than three and a half mills, nor more than four mills, per hundred pounds' weight, per mile; for transporting passengers, not less than three and a half cents per mile, nor more than four cents per mile for each passenger, with his baggage, not weighing more than forty pounds; except upon the article of coal, upon which there shall be charged not less than three cents on the bushel; but the charge on coal shall at no time be fixed at a rate which will not yield a profit on its transportation. Live stock, poultry and furniture; also feathers, wool, rags and other light, bulky articles, weighing not more than sixty-five pounds to the cubic foot; also silver and gold, bullion, money of all descriptions, and mails, are excepted from the rates herein established; and the board of directors, or their agents, shall be, and they are hereby, authorized to contract specially for their transportation, upon such terms as the parties interested may agree upon: Provided, such rates shall in no case exceed 15 per cent over the rates allowed to be charged for heavy merchandise or produce, except for gold, silver, bullion, money of all kinds, and nails. The said board of directors, and their agents, may charge for receiving, forwarding and storing such articles and packages as may be consigned to them, or deposited in their warehouses, or with their agents, for safekeeping, or to be forwarded; and they may establish, by their by-laws, rates of stor-

age, and other fees, for such services. But they shall make no rule or regulation, giving any preference in transportation of goods or other articles sent from other houses, stores or places; nor shall they make any difference in the rates of charges on goods, or other property, consigned to other persons for transportation on said road; but shall, in all things, receive and receipt for goods and property of every kind consigned to other persons, on the same terms as if consigned to themselves. It shall not be lawful for any other company, or any person or persons whatsoever, to travel upon or use any of the roads of said company, or to transport persons, or merchandise, or property of any description whatsoever, along said roads, or any of them, without the license or permission of the board of directors of said company, and that the said road or roads, with all their works, improvements and profits, and all the machinery of transportation used on said roads, are hereby vested in said company incorporated by this act, and their successors, forever. They may commence the business of transportation on their railroad when any part thereof is completed."

By Section 2 of the Act of March 5, 1850, incorporating the Louisville Company, it is created a corporation with perpetual succession. That section reads as follows:

"Section 2. That the capital stock of said Louisville & Nashville Railroad Company shall be three millions of dollars, in shares of one hundred dollars each, which may be subscribed for by any individual or corporation; and as soon as three thousand shares of said capital stock shall be subscribed, the subscribers of said stock, their successors and assigns, shall be, and they are hereby, declared to be incorporated into a company, by the name of the Louisville & Nashville Railroad Company, and by that name shall be capable of purchasing, holding, selling, leasing and conveying real estate not exceeding ten thousand acres, and personal and mixed estate, so

far as the same shall be necessary for the purposes of their incorporation, and no further; and shall have perpetual succession, and by said corporate name shall sue and be sued, and may have and use a common seal, which they shall have power to alter or renew at pleasure; and shall have, enjoy and exercise all the powers, rights and privileges which other corporate bodies may lawfully do."

By Section 14 of that act, it is only incorporated to construct a railroad from the city of Louisville to the Tennessee line, in the direction of Nashville. That section reads as follows:

"Section 14. That the president and directors of said company are hereby vested with all powers and rights necessary to the construction of a railroad from the city of Louisville to the Tennessee line, in the direction of Nashville; the route to be by them selected and determined, not exceeding sixty-six feet wide, with as many sets of tracks as they may deem necessary; and that they may cause to be made contracts with others for making said railroad, or any parts of it; and that they, their agents, engineers, etc., or those with whom they may contract for surveying or making the same, or any part thereof, may enter upon, use and excavate any land which may be wanted for the site of said road, or the erection of warehouses or other structures or works necessary to said road and its use, or for any other purpose necessary or useful in the construction or repair of said road, or its works and appurtenances; and they may build bridges and construct tunnels: Provided, the same do not obstruct the navigation on navigable streams; may fix scales and weights, lay rails, take and use any earth, timber, gravel, stone, or other material, which may be useful or necessary for the proper construction, completion or repair of said road."

It is our contention:

1. That the matter of regulating rates of a railroad

pertains to that branch of the police power which is not the subject matter of an irrevocable contract.

2. If it be pertinent for a state to preclude itself from the exercise of this power by an irrevocable contract, the charter of the Louisville Company does not come to an irrevocable contract on the subject of rates.

3. If the charter provisions relied upon do create an irrevocable contract, they do so only with reference to the main line of the Louisville system between Louisville and the Tennessee line, in the direction of Nashville, which, according to the allegations of the bill (R. 2), is 139.88 miles.

We think it will lend clearness to discuss these propositions in the order named.

In view of the many expressions contained in the judicial announcements of this court, to the effect that the rates of public carriers are always subject to the regulation of the police power of a state, except where an irrevocable contract has been made fixing a rate, it is with considerable hesitation that we make the contention announced in the first proposition. We are, however, encouraged in so doing by the fact that, as far as we are informed, this court has not, to this time, held the charter of any railroad or quasi-public corporation, with reference to rates, to constitute an irrevocable contract, relieving such railroad or corporation from the regulating power of the state creating it. In fact, wherever the question has been pressed upon the court, it has refused to give a final adjudication upon it, and in several cases serious doubts as to the existence of such a power in one legislature, by an irrevocable contract, to tie up succeeding legislatures, have been expressed.

In several decisions in the state courts the existence of such power has been denied, but in several decisions of the circuit Federal courts such contracts have been sustained.

If the court should conclude that the charter of the

Louisville Company comes to a contract with the state touching its rates, if the state has power to make such a contract, it may be that in this case the court will feel itself obligated to give a final decision upon this important question.

In the case of the Louisville Company it is contended and admitted by the demurrer, and is a fact which can not be denied, that that company is now charging rates very much below the maximum rates named in its charter. In fact, if it should charge up to the maximum there permitted, the rates would be almost confiscatory as to freight passing over its lines. Its contention, however, is that it has an irrevocable contract to charge the maximum there named, and, therefore, any attempt to reduce its rates would be a violation of its contract with the state. Its contention, therefore, is that the railroad commission has no right even to investigate its rates, or to take any step under the Act of March 10, 1900, regarding it, because to do so could only result in a futile act and idle ceremony, or in the doing of an illegal act, to wit, violating its contract in the reduction of its rates.

What we have heretofore said on the subject of jurisdiction applies, we think, to this claim of the Louisville Company, and that even if the contract were irrevocable, no jurisdiction would exist, in the court, to stay the hand of the commission until it had fixed a rate in violation of the contract. If it be true, as alleged in its bill, that its rates are reasonable, it must be assumed by the court that the commission will not interfere with these rates. We shall leave this phase of the case, however, with the argument heretofore made.

The circuit court in its opinion in the case at bar (R. 25), practically held that the Louisville Company had an irrevocable contract with the state, but, if not, the Act of March 10, 1900, can not be construed as intending to apply to the Louisville company.

The main reliance of the complainant for holding the

charter provision a contract, is this expression of Mr. Justice Brewer, in delivering the opinion in Reagan v. Trust Company, 154 U. S. 393:

> "If the charter had, in terms, granted to the corporation power to charge and collect a definite sum per mile for the transportation of persons or of property, it would not be doubted that that express stipulation formed a part of the obligation of the state, which it could not repudiate."

It must be observed, however, that in this enunciation the court was not there adjudging the matter. As we understand that case, the question of a charter contract to charge certain specified rates was not involved. The question of contract seems to have been raised and was treated by the court wholly with reference to its bearing upon the jurisdiction of the circuit court. It was there contended that by virtue of the act incorporating one of the railroads, a contract was created with the state, obligating the corporation to construct and operate a railroad between the termini named, and on the part of the state that it would not prevent the company from so constructing and operating the road, and therefrom it was contended that an attempt, on the part of the state, to so reduce the rates as to compel the corporation to operate the railroad at a loss was a violation of this contract. In making the above statement, relied upon, at bar, by the Louisville Company, the court was answering this contention. Therefore, it is that we say that this court did not intend, by that expression, to decide that it is within the power of a state to make an irrevocable contract probibiting it forever from exercising this important function of its police power.

It must also be borne in mind that until the case of Smyth v. Ames, 169 U. S., the decisions of the court left the matter in doubt as to the exact limitations upon the staet in reference to the extent of its power in regulating

rates. It had been held that they could not be confiscatory, and that they must be reasonable, and that the court would judge of the reasonableness of the rate when fixed, but the elements entering into the determination of the reasonableness of the rate had not been outlined, and there was some doubt as to whther the power of the state was limited at compelling the roads to do business at a loss, or whether the reasonableness of a rate included a profit on it business and dividends on its stock, and, if so, to what extent.

The Reagan case, as we understand it, bore only upon this feature. At all events, we do not think it can be said that the Reagan case is a direct authority upon the question now considered.

We are not unmindful of the fact that the right of taxation, than which there is possibly nothing more essential to the sovereignty of a state, may be bartered away. By repeated decisions the court is committed to this doctrine, but not without stubborn opposition. It must also be borne in mind that the decided tendency is against any further extension of the doctrine of the Dartmouth College Case. On the contrary, the tendency seems to be to confine the doctrine of that case, except in so far as the court has heretofore been committed, to strictly private corporations. At all events, the court has refused to extend or apply the doctrine to numerous exemplifications of the police power not more important than the one now under consideration.

Well established is the doctrine, that, that which pertains to the health, morality, welfare and good order of a state can not be bartered away by contract:

Stone v. Mississippi, 101 U. S. 814.
Douglas v. Commonwealth, 168 U. S. 488.
Fertilizing Company v. Hyde Park, 97 U. S. 659.
Louisville & Nashville Railroad v. Kentucky, 161 U. S. 677.

Boston Beer Company v. Massachusetts, 97 U. S. 25.
New Orleans Gas Light Co. v. Louisiana Light Co., 115 U. S. 650.
Mugler v. Kansas, 123 U. S. 623.
Slaughter House Cases, 111 U. S. 746.

In Ruggles v. Illinois, 108 U. S. 536, where a contract excluding the state from the exercise of its power to regulate rates was very much pressed upon the court, Mr. Chief Justice Waite used this language:

> "In the view we have taken of this case, the only question that need be considered is, whether the charter of the Central Military Tract Railroad Company, one of the Illinois corporations which, through agreements of consolidation are now represented by the Chicago, Burlington & Quincy Railroad Company, purports, on its face, to grant to the company the right to fix the rates of fare and freight to be charged for the conveyance of persons and property on its railroad, free of all control by the state. *If, on examination, we find that no such grant was intended, it will be unnecessary to decide whether one legislature has the power to bind succeeding legislatures by a contract to that effect.*" (The italics are ours.)

In New Jersey v. Yard, 95 U. S. 104, Mr. Justice Miller, in delivering the opinion of the court, used this language:

> "The writer of this opinion has always believed, and believes now, that one legislature of a state has no power to bargain away the right of any succeeding legislature to levy taxes in as full a manner as the Constitution will permit. But, so long as the majority of this court adhere to the contrary doctrine, he must, when the question arises, join with the other judges in considering whether such a contract has been made."

In Stone v. Trust Company, 116 U. S. 307, Mr. Chief Justice Waite, delivering the opinion of the court, said, in speaking of the power of a state to contract away its right to regulate railroad rates:

> "This power of regulation is a power of government continuing in its nature, and *if it can be bargained away at all* it can only be by words of positive grant or something which is, in law, equivalent." (The italics are ours.)

Although in that case both Mr. Justice Harlan and Mr. Justice Field dissented, on the ground that the rates of the road were protected by a contract, the dissent was not upon the theory that the state had a right to preclude itself by contract from making reasonable rates, but the theory of both the dissenting opinions seems to be that at that time it was conceived, that, under the regulating power of the state, the road would be bound by whatever rate the state might fix. In that case the extent of the right of the state to contract regarding the regulation of rates is, as we understand the dissenting opinions, to prevent from making unreasonable rates and enforcing them against the roads. Mr. Justice Harlan, in his opinion, said:

> "My only purpose is to express the conviction that each of these companies has a contract with the state, whereby it is exempted from absolute legislative control as to rates, and under which it may, through its directors, from time to time, within the limit of reasonableness, establish such rates of toll for the transportation of persons and property as they deem proper; *such rates to be respected by the courts and by the public, unless they are shown affirmatively to be unreasonable.*" (The italics are ours.)

Mr. Justice Field, in his opinion, said:

> "Certainly no one will deny that the right to adopt a rate of charges, *subject, as such rate always is, to*

> *the condition that they shall be reasonable, was of vital importance to the company.* Without that concession, no one acquainted with the difficulties, expenses and hazards of the projected enterprise can believe that it would have been undertaken. It was certainly the expectation of the constructors of the road that they should be allowed to receive compensation having some relation to its cost. But the Act of Mississippi allows only such compensation as parties appointed by the legislature, not interested in the property nor required to possess any knowledge of the intricacies and difficulties of the business, shall determine to be a fair return on the *value* of the road and its appurtenances, though that may be much less than the original cost." (The italics are ours.)

We do not think that either of these dissenting opinions tends to sustain the doctrine that the state, by contract, can preclude itself from regulating the railroads so as to require them to put in force a schedule of rates reasonably fair, both to itself and the public. Without the protection of a contract, by virtue of the Fourteenth Amendment as now established, it can not force upon the railroads the adoption of a reasonable rate.

In the case at bar, the Louisville Company, is seeking to have the court adjudge that it, by contract with the state, can charge a rate unreasonable and unfair to the public and amounting almost to the confiscation of the property of the shipper.

In the more recent rate cases, where a contract regarding rates has been claimed, the court has either avoided the question, or has answered it by finding that in the particular case there was not a contract.

In Railroad v. Illinois, 146 U. S. 387, touching the Lake Front in Chicago, claimed by the railroad under a contract and grant from the state, Mr. Justice Field, in delivering the opinion of the court, said:

> "There can be no irrepealable contract in a conveyance of property by a grantor in disregard of a

public trust under which he was bound to hold and manage it."

In Railroad v. Nebraska, 170 U. S. 57, on writ of error to the Supreme Court of Nebraska, it was contended on behalf of a railroad that the viaduct which the state was seeking to compel it to maintain and repair had been constructed by it under a contract with the state, which relieved it from this obligation. Mr. Justice Shiras, in delivering the opinion of the court in that case, speaking on the contention of the contract, said (page 72):

"No doubt, the agreement of 1886 constituted a contract, in such a sense that the respective parties thereto continued to be bound by its provisions so long as the legislation, in virtue of which it was entered into, remained unchanged. While the agreement lasted, its provisions defined the rights and duties of the city and the railroad companies. But was it a contract whose continuance and operation could not be affected or controlled by subsequent legislation? Usually, where a contract, not contrary to public policy, has been entered into between parties competent to contract, it is not within the power of either party to withdraw from its terms without the consent of the other; and the obligation of such a contract is constitutionally protected from hostile legislation. Where, however, the respective parties are not private persons, dealing with matters and things in which the public has no concern, but are persons or corporations whose rights and powers were created for public purposes, by legislative acts, and where the subject matter of the contract is one which affects the safety and welfare of the public, other principles apply. Contracts of the latter description are held to be within the supervising power and control of the legislature, when exercised to protect the public safety, health, and morals, and that clause of the Federal Constitution which protects contracts from legislative action can not, in every case, be successfully invoked. The presumption is

that, when such contracts are entered into, it is with the knowledge that parties can not, by making agreements on subjects involving the rights of the public, withdraw such subjects from the police power of the legislature."

To the same effect, see:

Railroad v. Bristol, 151 U. S. 556.
Railroad v. Defiance, 167 U. S. 88.

In Louisville & Nashville Railroad v. Kentucky, 161 U. S. 677, on writ of error to the Court of Appeals of the State of Kentucky, regarding the right of the Louisville & Nashville Railroad to purchase a parallel railroad, notwithstanding a provision of the State Constitution of 1891, prohibiting such purchase or consolidation, it was contended, on behalf of the road, that, under its charter, granted in 1856, it had an irrepealable contract with the state, conferring upon it this power. In speaking upon that subject, Mr. Justice Brown, in delivering the opinion of the court, said (page 695):

"While there is no general reservation clause in the charter of the L. & N. Co., we think, for the reasons stated in the Pearsall case, that under its police power the people, in their sovereign capacity, or the legislature as their representatives, may deal with the charter of a railway corporation, so far as is necessary for the protection of the lives, health, and safety of its passengers, or the public, or for the security of property, or the conservation of the public interests, provided, of course, that no vested rights are thereby impaired. In other words, the legislature may not destroy vested rights, whether they are expressly prohibited from doing so or not, but otherwise may legislate with respect to corporations, whether expressly permitted to do so or not. While the police power has been most frequently exercised with respect to matters which concern the public health, safety, or morals, we have frequently held

that corporations engaged in a public service are subject to legislative control, so far as it becomes necessary for the protection of the public interests."

In the case of Pearsall v. Railroad, 161 U. S. 648, this court, speaking through Mr. Justice Brown, in a case involving the right of a state to prohibit the consolidation of two railroads, notwithstanding permission so to do was granted in its charter, said (page 667):

> "The contract protected by this clause must also be founded upon a good consideration. If it be a mere nude pact and bare promise to allow a certain thing to be done, it will be construed as a revocable license," (citing a great number of cases).

And again (page 675):

> "We think it was competent for the legislature, out of due regard for the public welfare, to declare that its charter should not be used for the purpose of stifling competition and building up monopolies. In short, we can not recognize a vested right to do a a manifest wrong."

It would seem that the regulation of railroads, to prevent the imposition upon the public of extortionate rates, is as important to the welfare of the people, as the prevention of monopolies by the consolidation of public agencies. In fact, the object of preventing consolidation is to prevent extortion. If the one is not the subject matter of an irrevocable contract, neither should the other.

In the case of Railroad v. Transportation Company, 25 W. Va. 324, it was urged upon the court that a contract had been made with the state, fixing the rates to be charged, and that this could not subsequently be changed by the state. For the contention, reliance was placed upon that expression of Mr. Chief Justice Waite, in the Granger cases, to the following effect:

"It was within the power of the company to call upon the legislature to fix permanently the limit and make it a part of the charter. If that had been done, the charter might have presented a contract against future legislative interference."

In rejecting the argument there made, in a well-considered opinion reviewing many authorities, the Supreme Court of West Virginia (on page 363) said:

"If the price was fixed in the charter for such use, it could be afterward changed by the legislature at its pleasure, just as the legislature, though no price was fixed in the charter, and the company by it was entirely unrestricted as to the price it might charge for the use of its property, could, as decided by these Granger cases, subsequently fix the price to be charged, and change it from time to time, as might seem by it to be required by the public good. This necessarily results, because it is always agreed, tacitly, by every common carrier, whether a private person or a railroad company, when he engages in that business, that the legislature may, from time to time, as it pleases, fix the charges for the transportation of passengers or freight. If a price, which may be charged for such service, is named in the charter, it is but a legislative fixing of the charge for the time being, and it may be changed from time to time; and even if there was inserted in the charter a provision that the price fixed in the charter should never be altered by the legislature, that would not alter the case, for by the decisions of the court in the Granger cases the common carrier, as soon as he engages in this business, whether he be a private person or a railroad company, agrees that his charges for the use of his property may be controlled by the public, through the legislature, at its pleasure; and this agreement or understanding must necessarily make any stipulation in the charter, that the charges of the company shall never be changed, a mere nullity."

We are aware that several state court decisions and several decisions of the Federal Circuit Court have recognized the right of one legislature to contract with reference to tolls to be charged by a railroad, so as to render an attempt by a succeeding legislature to fix the tolls an impairment of a contract within the Federal Constitution. See

Pingree v. Railroad, 76 N. W. 635.
Stone v. Railroad, 62 Miss. 607.

A similar ruling was made by the Federal Circuit Court in the case of Central Trust Company v. Citizens' Str. R. Company, 80 Fed. 218; 82 Fed. 1; 83 Fed. 529; 27 C. C. A. 580; but a contrary ruling was made by the Supreme Court of the state touching the same charter rights.

Nevin v. Indianapolis, 151 Ind. 139; 47 N. E. 525; 51 N. E. 80.

If an irrevocable contract can be made touching the rates of a common carrier, the question still remains as to whether the particular provision relied upon comes to a contract on the subject within the protection of the Federal Constitution.

To do this, it is our contention that the language of the charter provision, referring to rates, must do more than merely fix a maximum, and that it must show clearly that the state intended to exclude itself, in the future, from exercising any power to change or alter the rates fixed. The charter must not only fix the rates for the time being, but must also, by clear language or necessary implication, exempt the corporation from all future and further regulation on the subject. If the charter merely fixes a maximum of rates, then it is competent, at any time, for the state further to regulate the rates within the maximum thus made. Such action would be no violation of the contract, even if the charter provision were construed as a contract fixing the maximum. The fixing of such a maximum precludes the corporation from charging beyond it,

but leaves the corporation the power to fix any rate within the maximum when circumstances alter. Added to this is the common law and common understanding that the rate fixed within the maximum shall be reasonable. It is the duty of the corporation to fix a rate reasonable to the public? The state, unless it has by words of exemption precluded itself is, at all times, at liberty to compel the corporation to do that which is its duty to do. A charter incorporating a railroad and fixing a maximum of rates is not, in legal effect, different from the granting of a charter, under a general law, existing at the time fixing such a maximum.

It will hardly be contended that a railroad, simply because it was chartered while a general law existed fixing certain rates, thereby had a contract with the state that those maxima should exist for all time to come. By either a general law or a specific provision in a charter fixing a schedule of maximum rates, the legislature undertakes only to say that such a schedule, at that time, is reasonable, still reserving, however, the power to change the rate as circumstances change.

It is not to be forgotten that under the second section of the charter of the Louisville Company, quoted supra, it is made a perpetual corporation. Therefore, if the provisions relied upon constitute a contract, the Legislature of Kentucky, in 1850, has undertaken the foolish task of providing a maximum schedule of rates to govern to the end of time, regardless of the fact, necessarily contemplated, that in the course of events, such rates must become extortionate.

Mr. Tiedeman, in his work on State and Federal Control of Persons and Property, page 952, Section 209, in speaking of the rule for the interpretation of such provisions in charters, says:

> "Apart from the question whether the state can barter away its police power, the intention of a legislature to place a private corporation beyond the

reach of the police power of the state—to grant to a corporation the right to do what it pleases in the exercise of its corporate powers, it matters not how much injury is inflicted upon the public, and yet be subject to no control or restraint, which is not provided by the laws in force when the charter was granted—is so manifestly unreasonable that we can not suppose that the legislature so intended, unless this extraordinary privilege is expressly granted."

And again, on page 955:

"Unless there is an express reservation of a freedom from the restraint of police regulations, it would be an exceedingly liberal, and, hence, wrongful, construction of the constitutional protection, against the impairment of the obligation of contracts, to place corporations above and beyond the ordinary police power of the state. As a general proposition, the principle here advocated has been recognized and adopted by the courts generally. It is only in the application of the principle to a particular case that any doubt as to its correctness is felt or expressed."

Mr. Russell, in his work on Police Powers of the State (pages 127, 128), lays down the rule thus:

"The decision in the Charles River Bridge case is the existing law as appears in the recent opinion of Mr. Justice Gray. He said that every public grant, if ambiguous, is to be construed against the grantee, because an intention to grant away rights in which the whole public is interested can not be presumed unless unequivocally expressed, or necessarily to be implied; and, also, because the grant is supposed to be made at the solicitation of the grantee, and to be drawn up by him, and the words used are to be treated as the words of the grantee. 'This rule of construction,' he said, 'is a safeguard of the interest of the public against any attempt of the grantee to take by the insertion of ambiguous language what could not be obtained by clear and express terms,' citing the Charles River Bridge case and others," citing:

Central Transp. Co. v. Pullman Co., 139 U. S. 49, and other cases.

In Fertilizing Company v. Hyde Park, 97 U. S. 659, this court said:

> "The rule of construction in this class of cases is that it shall be construed most strongly against the corporation. Every reasonable doubt is to be resolved adversely. Nothing is to be taken as conceded, but what is given in unmistakable terms or by an implication equally clear. The affirmative must be shown. Silence is negation, and doubt is fatal to the claim. This doctrine is vital to the public welfare. It is axiomatic in the jurisprudence of this court."

In Minott v. Railroad, 18 Wall. 204, known as the Delaware Railroad Tax Cases, it was held that a provision in the charter that the railroad company should pay annually into the treasury of the state a tax of one-quarter of one per cent on its capital stock of $400,000.00, without any words indicating the intent of the legislature that no further or different tax should be subsequently levied, was not sufficient to show a contract prohibiting the state from making a different tax levy, the court there remarking

> "The surrender, when claimed, must be shown by clear and unambiguous language, which will admit of no reasonable construction consistent with the reservation of the power."

To the same effect is Bailey v. Maguire, 22 Wall. 215.

In Stone v. Wisconsin, 94 U. S. 181, it was held that a charter provision making it lawful for the company to demand and receive such sum or sums of money for passage and freight of persons and property as they shall, from time to time, think reasonable, did not amount to a contract, delegating to the railroad the right to fix its own rates.

In Ruggles v. Illinois, 108 U. S. 536, it was held that a provision of a railroad charter conferring power upon the

directors of the road, in the language following, did not amount to a contract:

> "The directors of such company shall have power to make by-laws for the management and disposition of stock, property and business affairs of such company, not inconsistent with the laws of this state. . . .
>
> "To regulate the time and manner in which passengers and property shall be transported, and the tolls and compensation to be paid therefor; but such compensation for any passenger and his ordinary baggage, shall not exceed three cents a mile, unless by special act of the legislature, and shall be subject to alteration as hereinafter provided. . . .
>
> "Section 32. The legislature may, when any such railroad shall be opened for use, from time to time, alter or reduce the rates of toll, fare, freight or other profits upon such road; but the same shall not, without the consent of the corporation, be so reduced as to produce with said profits less than fifteen per cent per annum on the capital actually paid in; nor, unless on an examination of the amounts received and expended, to be made by the secretary of state, he shall ascertain that the net income divided by the company from all sources for the year then last past shall have exceeded an annual income of fifteen per cent upon the capital of the corporation actually paid in."

Mr. Chief Justice Waite, in holding that, notwithstanding this charter, the state could regulate the matter of rates, said:

> "Grants of immunity from legitimate governmental control are never to be presumed. On the contrary, the presumptions are all the other way, and unless an exemption is clearly established the legislature is free to act on all subjects within its general jurisdiction, as the public interests may seem to require. As was said by Chief Justice Taney, speaking for the court, in Charles River Bridge v. Warren Bridge, 11 Pet. 547: 'It can never be assumed that the government intended to diminish its power of ac-

complishing the end for which is was created.' This is an elementary principle."

To the same effect are

Railroad v. Illinois, 108 U. S. 541.
Ruggles v. Illinois, 91 Ill. 262.

In Stone v. Trust Company, 116 U. S. 307, it was contended on behalf of the railroad that the following provision of the charter exempted it from further regulation of its rates by the state:

"That it shall be lawful for the company hereby incorporated, from time to time, to fix, regulate and receive the toll and charges by them to be received for the transportation of persons or property on their railroad or way aforesaid, hereby authorized to be constructed, erected, built or used, or upon any part thereof."

In holding such provision not to amount to a contract, this court said:

"This power of regulation is a power of government, continuing in its nature; and if it can be bargained away at all it can only be by words of positive grant or something which is in law equivalent. If there is reasonable doubt, it must be resolved in favor of the existence of the power. In the words of Chief Justice Marshall, in Providence Bank v. Billings, 4 Pet. 560 (29 U. S. bk. 7, L. ed. 955), 'its abandonment ought not to be presumed in a case in which the deliberate purpose of the state to abandon it does not appear.' . . . The right to fix reasonable charges has been granted, but the power of declaring what shall be deemed reasonable has not been surrendered. If there had been an intention of surrendering this power, it would have been easy to say so. Not having said so, the conclusive presumption is there was no such intention."

In Stone v. Railroad, 116 U. S. 347, it was held that the grant of power to the president and directors of a railroad to adopt and establish such rates for transportation as they may deem proper, and to alter and change the same at pleasure, does not amount to a contract, but leaves the state free, within the limits of general authority, to act as to the reasonableness of such rates. In this case (on page 352) it was held that the provision in a charter, that in fixing rates there shall be no discrimination in favor of any other road, does not bring into that charter the rate clause in charters subsequently granted fixing maximum rates so as to exempt such railroad from the operation of the railroad supervision act of Mississippi.

In Banking Company v. Smith, 128 U. S. 174, the following provisions in the charter were relied upon as constituting a contract:

> "The said Georgia Railroad Company shall, at all times, have the exclusive right of transportation or conveyance of persons, merchandise and produce, over the railroad and railroads to be by them constructed, while they see fit to exercise the exclusive right; provided, that the charge of transportation or conveyance shall not exceed fifty cents per hundred pounds, on heavy articles, and ten cents per cubic foot, on articles of measurement, for every one hundred miles; and five cents per mile for every passenger; provided, always, that the said company may, when they see fit, rent or farm out all or any part of their exclusive right of transportation or conveyance of persons, on the railroad or railroads, with the privilege to any individual or individuals, or other company, and for such terms as may be agreed upon, subject to the rates above mentioned. And the said company, in the exercise of their right of carriage or transportation of persons or property, or the persons so taking from the company the right of transportation or conveyance, shall, so far as they act on the same, be regarded as common carriers."

Mr. Justice Field, in delivering the opinion of the court denying the contract, said:

> "It does not mater, in the present case, whether the term be construed as imposing a condition on the preceding exclusive grant to the company of the privilege of transporting passengers and merchandise over its own roads, or be considered merely as a conjunction to an independent paragraph, declaring a limitation upon the charges which the company may make. If considered as a condition to the enjoyment of the exclusive right designated, then the section only provides that, so long as the maximum of rates specified is not exceeded, the company or its lessee shall have the exclusive right to carry passengers and merchandise over its roads. *It contains no stipulation, nor is any implied, as to any future action of the legislature.* If the exclusive right remain undisturbed, there can be no just ground of complaint that other limitations than those expressed are placed upon the charges authorized. It would require much clearer language than this to justify us in holding that, notwithstanding any altered conditions of the country in the future, the legislature has, in 1833, contracted that the company might, for all time, charge rates for transportation of persons and property over its line up to the limits there designated." (The italics are ours.)

In the course of the opinion, the learned justice takes occasion to refer to the fact that the theory prevailed at the time the charter was granted (1833) that a railroad was subject, like an ordinary wagon road, to the use of all persons who are able to place the necessary conveyances upon it. While the company was the owner of the roadbed, any other person could run cars upon it upon payment of established tolls.

The same theory, under almost similar charter provisions, inheres in the charter of 1850, under which the Louisville Company is here claiming a contract with the

state of Kentucky. We think that the case cited is analogous to and governs the case at bar.

In the two cases of Railroad v. Minnesota, 134 U. S. 418, 467, it was held that a charter provision giving power to the directors of the company to make rules as to rates of toll does not constitute a contract that it shall have the right, for all future time, to prescribe its rates of toll, which are thereby controlled by the legislature of the state.

In Smyth v. Ames, 169 U. S. 466, it was contended that, as to the Union Pacific, the state had no right to control the rate, because under a provision of an Act of Congress creating the road it was provided, as follows:

> "Whenever it appears that the net earnings of the entire road and telegraph, including the amount allowed for services rendered for the United States, after deducting all expenditures, including repairs, and the furnishing, running and managing of said road, shall exceed 10 per centum upon its cost, exclusive of the 5 per centum to be paid to the United States, Congress may reduce the rates of fare thereon, if unreasonable in amount, and may fix and establish the same by law."

In holding that this was not the result, this court said:

> "Undoubtedly, Congress intended by that act to reserve such power as was necessary to prevent the corporation from exacting rates that were unreasonable. But this is not equivalent to a declaration that the states through which the railroad might be constructed should not regulate rates for transportation begun and completed within their respective limits."

In Turnpike v. Sandford, 164 U. S. 578, it was held that a grant, to each of two new corporations, of the powers, rights and capacities which had been granted

to a corporation which they succeeded, and to the property which is divided between them, does not confer on the new companies the exemption conferred upon the original company from legislation changing the rates of toll; and that, if a contract with a state relating to the exercise of franchises is susceptible of two meanings, the one restricting, and the other extending the powers of a corporation, that construction should be adopted which works the least harm to the state. That case came up on writ of error to the Court of Appeals of Kentucky. In the state court was reversed by this court, it was not merely fixing a maximum rate of toll to be charged does not constitute a contract between the state and the turnpike company, which deprives the state of all power thereafter to modify or regulate the rate of toll. While the state court (14 K. L. R. 689) it was held that an act because of any disagreement with the state court on this proposition, but wholly because the rate which the state had fixed was unreasonable.

In Commonwealth v. Covington Bridge Company, 21 S. W. 1042, a contract prohibiting the state from fixing rates was contended for, under the following charter provision of an act of the state of Kentucky, dated February 17, 1846:

> "That the president and directors shall have the right to fix the rates of toll for passing over said bridge, and to collect the same from all and every person or persons passing thereon with their goods, carriages, or animals of every description or kind: provided, however, that the said company shall lay before the legislature of this state a correct statement of the cost of said bridge, and an annual statement of the tolls received for passing the same, and also the cost of keeping said bridge in repair, and of the other necessary expenses of the company; and the said president and directors shall, from time to time, reduce the rates of toll, so that the net profits of said bridge shall not exceed 15 per cent per annum,

after the proper deductions are made for repairs and charges of other descriptions. Toll gates shall be kept, and tolls received at each end of the bridge, and the rates of tolls shall be posted up in some conspicuous place where toll is demanded.' On the 5th of February, 1861, the capital stock was increased to $1,000,000, and the company also authorized to issue one-half of the amount in preferred stock, provided 'that it shall be lawful to prefer such stock to the extent of fifteen per cent per annum, and no more.'"

In a well-considered opinion reviewing many authorities, the Court of Appeals of Kentucky, in ruling against the contention of contract, said:

"It is not pretended that the charter of the appellee, the Cincinnati & Covington Bridge Company, can be repealed, because there was no such power reserved in the grant, and the general law now found upon the statute book of the state, where this power is expressly reserved, was not enacted until after the grant was made; nevertheless, this power to regulate tolls over public ways, and in this class of cases, being the exercise of a governmental power, as must be conceded, its exercise may be resumed at any moment, unless by contract the state has surrendered it. We have found no decision of the Supreme Court, since this question as to the right of a state to surrender these governmental powers has been mooted, where private property has been devoted to public use under legislative grants, in which that court has construed the grant as containing stipulations precluding the state from exercising any control over the rates or charges the citizen is required to pay for its use. There are many changes in the condition of the country, as well as its people, during a period of 40 years. What may have been a reasonable rate of toll or income upon such investments 40 years ago would now be deemed exorbitant, and before this court should hold that the corporation had the right to a net income of 15 per cent per annum, to be paid by the public so long as the struc-

ture exists, or that this power of government had been delegated to those whose interests were adverse to the public, it should entertain no doubt of the purpose of the legislature to surrender by the words of the grant all future legislative control over the subject matter. The capital stock of this corporation at the time its charter was obtained, and the right to charge these tolls given, was only $300,000, and has been increased, from time to time, to $1,785,000, upon which sum the right to an income of 15 per cent per annum is claimed, although the amendments by which this increase of stock was made were enacted, as well as other amendments, since the passage of the general law reserving to the state the power to alter or repeal corporate grants."

By express decision in this case, the case of Hamilton v. Keith, 5 Bush, 458, which may be relied upon by the Louisville Company, was overruled. In the Keith case, by Section 6 of the charter of the Covington & Lexington Railroad, dated February 6, 1854, certain provisions were made as to rates. No right was reserved to the state to alter, amend or repeal the charter. Subsequently, on February 16, 1869, the sixth section of the previous charter was repealed and a different tariff of way freights established. Hamilton tendered a lot of freight and demanded its transportation at the rates established by the last act. This was refused and suit was brought. The state court held the act of 1869 to be unconstitutional, as violating the obligation of the contract of 1854. This decision, in this regard, is expressly overruled in the Covington Bridge case. On writ of error, it is true, the state court was reversed in the Covington Bridge case, 154 U. S. 205, but not because there was any difference of view as to the disposition of the contract contention, but wholly because the said act was an interference with interstate commerce, as the bridge spanned the Ohio river between Covington and Cincinnati.

In Railroad v. Miller, 132 U. S. 75, the Pennsylvania

Railroad contended for an exemption from consequential damages resulting from the construction of its railroad under a charter grant, similar in principle to that invoked by the Louisville Company. This court, in holding that there was no contract, said:

> "Nor will the exemption claimed from future general legislation, either by a constitutional provision or by an act of the legislature, be admitted to exist, unless it is expressly given, or unless it follows by an implication equally clear with express words. In the present case, the statutory provisions existing prior to the Constitution of 1873, in favor of the defendant, can not be properly interpreted so as to hold that the state parted with its prerogative of imposing the liability in question, in regard to future transactions."

In Winchester Turnpike Company v. Croxton, 98 Ky. 739, 33 L. R. A. 189, the sole question for decision was whether an act of the legislature of Kentucky limiting the tolls to be charged by the turnpike company violated its contract with the state. The provision there relied upon as constituting a contract was contained in a charter granted in 1834, not subject to alteration, amendment or repeal, and was as follows:

> "Section 15. It shall be lawful for the president and managers . . . to collect and receive of and from all and every person or persons using said road the tolls and rates hereinafter mentioned, and to stop any person riding, leading or driving any horse, etc., . . . until they shall have paid toll agreeably to the following rates, to wit: For every twenty head of sheep, hogs or other small stock, six and a fourth cents, etc.
>
> "Section 21. And if at any time it shall appear that the clear income and profits will not yield a dividend of six per centum per annum on the capital stock so expended from the time of investing the same, then it shall and may be lawful for the president and

managers to increase the toll herein allowed so on each and every allowance thereof as will raise the dividend up to six per centum per annum; and if at any time it shall appear by the said abstracts that the said income and profits will yield a dividend exceeding twelve per centum per annum, then the said tolls shall be reduced so as to reduce the dividend down to twelve per centum per annum."

Subsequently, in 1893, by an act of the legislature, a different schedule of maximum rates was fixed for turnpike companies. In holding the provision relied upon not to constitute an irrevocable contract, the state court, in a well-considered opinion said:

"The determination by the state that for to-day, or for an indefinite time in the future, the charge of six and a fourth cents for every twenty head of sheep driven through the gates of the company would be a reasonable charge, is not a final settlement or determination of what may be reasonable sixty years hence; and the exercise once by the state of the right to fix the rate at what was then deemed reasonable is not in itself exhaustive of this power. Admittedly the rate fixed is reasonable—the legislative will so declares—but what is reserved? What is it that the public is interested in reserving? Manifestly that the rate should *continue* reasonable, and what was to be deemed reasonable in the future the legislature was to decide, whenever it chose to act, just as it exercised the right in the first instance. It is precisely as if in front of the company's charter the state had written, 'I grant you the right to charge certain fixed rates, and these may be increased or diminished within certain limits according as you make six or twelve per centum per annum on the capital invested. These rates and profits are reasonable, but I go no further. I do not say I shall always regard them reasonable. I reserve, as I do not expressly barter away, the power to provide reasonable rates for the traveling public of the future.'

"If the state had meant otherwise it would have

said that the rates as fixed herein shall remain unchanged forever, and, to sustain appellant's contention, these important words must be interpolated into the charter; and this is true, not only with reference to the special rates of toll fixed, but to the specified minimum and maximum rates of interest as well. The fixing of the tolls and the rates of interest allowable was but an expression of the legislative will that such tolls and such rates of interest were, for the time being, reasonable and lawful; and there is no promise, expressed or implied, that further and future regulation is finally abandoned by the state. . . . We are convinced that the General Assembly intended, by the charter in question here, merely to indicate the rates of toll then supposed to be reasonable, and to provide for a like reasonable profit, in the way of interest, without intending to abandon forever its power to exercise control over and limit the rates of toll and the profits of the company in the future. The doctrine that the state reserved to itself its governmental functions and powers of further regulating the property and franchises of corporations created by it, where the public were affected, was announced as early as in 1830 in the case of Providence Bank v. Billings, 4 Pet. 514, and we have no reason to believe that the representatives of the state contracted in ignorance of this principle."

In Ragan v. Aiken, 9 Lea 610, it was contended that the following provision of a railroad charter amounted to a contract, preventing the state from further changing the rates to be charged. (We quote from the charter, Section 14, Act of Tennessee, 1845, chartering the Nashville & Chattanooga Railroad, as set forth on page 615 of the case):

"That section confers upon the company the exclusive privilege to carry freight and passengers over the road, and adds: 'Provided, that the charge for transportation or conveyance shall not exceed 35 cents per hundred pounds on heavy articles, and 10 cents per cubic foot on articles of measurement

for every hundred miles, and 5 cents a mile for every passenger; and provided also, that the said company may, when they see fit, farm out their right of transportation on said road subject to the rate above mentioned.'"

In holding that this provision did not come to an irrevocable contract, the court, in a well-considered opinion, said (page 617):

"Railroad companies, as quasi-public corporations exercising franchises granted in consideration of accommodations afforded the public, are required and may be compelled, by the courts, to afford reasonable and impartial facilities of transportation. Their charges, when not regulated by charter or by statute, must be reasonable, and the courts will determine whether their charges are reasonable: Munn v. Illinois, 94 U. S. 113, 133; Chicago v. Iowa, 94 U. S. 155; Reg. v. Grand Junction Co., 4 A. & El. 16. If only a maximum limit of charge be fixed by charter, the reasonableness of other charges within the limit may be tested in the courts. If the charge for each service be fixed by law, or if the intention of the legislature is clear to only allow certain specified fares or tolls, leaving other cases unprovided for, the company must abide by its contract. . . .

"We are of opinion that no such intent appears in the language of our statute; that the object was to fix a maximum charge beyond which the companies could not go, and to leave the tariff of charges, within that limit, to the companies, subject to the rules of the common law and the regulating power of the courts and the legislature."

In Water Company v. Fergus, 178 Ill. 571, 53 N. E. 363, the Supreme Court of Illinois said, in passing upon a similar claim with reference to a contract for water rates:

"We do not think the adoption of the alleged ordinance by the village of Rogers Park, and the

acceptance and fulfillment of the conditions thereof by the appellant company, vested it, as with a property right, with the power to demand that the rates named in the ordinance should remain fixed and unchanged for the period in which it was licensed to occupy the streets of the village, or that the ordinance and its acceptance constituted a contract, or that any contract obligations arose by reason thereof. . . . The village exercised the power by incorporating in the ordinance a scale of prices as being just and reasonable maximum rates to be paid to the company by the consumer of water. This provision of the ordinance had no effect to establish a contract between the appellant company and the village that the individual inhabitants of the village should and would pay such rates for the period of 30 years, or any fixed period of time, but was simply a declaration on the part of the village that such rates were reasonable. . . . Nor did the fixing of rates by the alleged ordinance of the village of Rogers Park vest in the appellant company an irrevocable right to exact such rates for the period it had been granted permission to occupy the streets, alleys and public places of the village, or for any fixed period. A rate or price reasonable and just when fixed may, in the future, become so unreasonably high that the exaction of such rate or price is but an extortion. The duty of the corporation does not, however, change, but remains the same; that is, to exact only reasonable compensation. The power of the state to enforce that duty is not exhausted by its exercise in the first or any subsequent instance, but is continuous, and may be exerted from time to time, whenever necessary to prevent extortion by the agency created by the state to serve the public. Whenever the evil of extortion exists, the power to eradicate it may be successfully invoked. In the exercise of that power by the state, or by a municipality exercising the power by delegation from the state, there is no admixture whatever of any contractual element; nor does the corporation against whom the power is exercised obtain any vested property interest or property right in the scale of rates deemed at any particular time to

be reasonable maximum prices for the article to be supplied by the corporation."

Of like kind is the case of City of Danville v. Danville Water Company, 178 Ill. 299, 53 N. E. 118; id 180 Ill. 235, 54 N. E. 224, and Freeport Water Company v. City of Freeport, 57 N. E. 862.

In the case of City of Danville v. Danville Water Company, supra, the court says:

> "A legislative body can not part with its powers by any proceeding, so as not to be able to continue the exercise of such powers. It has no authority, even by contract, to control and embarrass its legislative powers and duties. Greenh. Pub. Pol. p. 317; Cooley, Const. Lim. p. 206; 15 Am. & Eng. Enc. Law, p. 1045; 1 Dill. Mun. Corp. Section 443. What might be proper for a city this year might not be proper the next year. It is impossible to determine with absolute or even tolerable certainty what changes a few years might work in the character and reasonableness of rates to be charged for water supply. No contract is reasonable by which the governing authority abdicates any of its legislative powers and precludes itself from meeting, in a proper way, emergencies or occasions that may arise. 'These powers are conferred in order to be exercised again and again, as may be found needful or politic, and those who hold them in trust to-day are vested with no discretion to circumscribe their limits or diminish their efficiency, but must transmit them unimpaired to their successors. This is one of the fundamental maxims of governments; and it is impossible that free government with restrictions for the protection of individual or municipal rights could long exist without its recognition.'" Gale v. Village of Kalamazoo, 23 Mich. 354; Milliken v. County of Edgar, 142 Ill. 528, 32 N. E. 493.

A great number of authorities of like kind and to like effect are reviewed in the opinion.

We believe that, in the main, where this court has held a contract to exist with reference to any surrender by a state of any part of its sovereignty to a corporation or person discharging a public duty, some provision amounting to an express exemption of the company or person from the future exercise of the power will be found. Such a provision is found in Gordon v. Appeal Tax Court, 3 How. 133.

There the provision was:

> ". . . that upon any of the banks in this state complying with the condition of this act, the faith of the state is hereby pledged not to impose any further tax or bonus upon the said banks during the continuation of their charters under this act."

In the case at bar, Section 18 of the charter relied upon expressly provides only a maximum. There are no words excluding the state from changing this maximum or fixing in the future, with the change of circumstances, a reasonable rate within it, nor are there any words exempting the road from the future control of the state in regard to its rates. The provision is very similar to that of the Nashville and Chattanooga charter reviewed by the Supreme Court of Tennessee in 9 Lea, supra. Moreover, Section 18 of the charter shows the contemplation by the state of facts such as was contemplated in the charter reviewed in the case of Banking Company v. Smith, 128 U. S. It contemplated the creation of a railroad on the order of a turnpike company. As shown in its bill, the main line was not constructed until about 1859. The condition with reference to which a maximum schedule of rates and tolls was fixed as reasonable for the time being in Section 18 has never existed, but, on the contrary, the theory of a toll road has been wholly abandoned. It is not claimed in the bill that any such road as was contemplated in Section 18 was constructed.

It will be observed that Section 18 of the charter of the

Louisville Company confers upon the president and directors of the company "power to charge for tolls . . . any sum not exceeding the following rates" (upon certain specified articles), and "for persons and any species of live stock, and every other description of freight and property, they shall charge no greater rate than is authorized to be charged on the railway from Lexington to Frankfort."

There is no word or expression in this or any other section of the charter, which indicates the intention of the legislature to make irrevocable the grant to charge the specified rates. In the absence of any rate being fixed in the charter, the company would have had the right to charge a reasonable rate. The rates named in the charter amount to the expression of the legislative opinion of what was regarded as reasonable.

In arriving at the legislative intent it will be useful to consider the language used in Section 18 in reference to taxation of the property of the company and the construction of parallel lines. It is there provided that the property of the company "shall never be taxed beyond the rate of tax imposed upon real estate, estimated upon the prime cost of the proposed works; nor will the legislature of this Commonwealth, *for the space of thirty years*, authorize any other railroad to be laid down, on a parallel line, with the one located by this company, extending from Louisville to the Tennessee line, approaching nearer than ten miles."

By this grant it was intended to give immunity from taxation, beyond a certain rate, for all time, and to assure the company that no parallel road should be constructed for thirty years. It certainly seems strange that the legislature, having used these strong expressions indicating a purpose to stay its hands upon the subject of taxation, and the chartering of competing lines, should have also intended to bind itself never to interfere with the rates named in the charter, and yet failed to use

like expressions of its purpose. It declares that it will "never" exceed a certain rate of taxation, and that it will not, for "thirty years," charter a competing line, but it only declares, as to rates, that the company has authority or power to charge certain sums. But how long may it charge these specified sums? The charter is silent. It is certainly fair to assume that if the legislature had intended to bind the state for all time, as to rates, it would have declared its purpose in plain and unmistakable terms. The use of these terms by the legislature in Section 18 shows that it fully comprehended the effect of its language, and that where it was intended to bind the state, appropriate expressions were used.

We submit that it would do violence to the legislative intent to construe as irrevocable this simple grant to collect certain rates.

That the manifest intention of the charter was only to establish what was then deemed to be a reasonable tariff of rates appears, we think, from not only the charter as a whole, but from the provisions expressly relating to the rates, and which are relied upon to constitute a contract. A limitation was put upon the power of the company in charging toll, but not upon the sovereign power of the state to change and regulate the rates as the public interests might demand. The language of the charter is:

> "They (the directors) shall have power to charge for tolls and the transportation of persons, merchandise and property, of any kind whatever, transported along said railway, any sum not exceeding the following rates, to wit: On all goods, merchandise or property, for every one hundred pounds transported over twenty miles, and under fifty miles, three and one-half mills for each mile; and for persons and every species of live stock, and every other description of freight and property, they shall charge no greater rate than is authorized to be charged on the railway from Lexington to Frankfort."

We here have a power conferred upon the company to charge any rate within a maximum for a haul over twenty miles and under fifty miles. Nothing is said with reference to a haul under twenty miles, or over fifty miles. With regard to such hauls there could hardly be a doubt that only a maximum was fixed. The language is that:

> "They (the directors) shall charge no greater rate than is authorized to be charged on the railway from Lexington to Frankfort."

This is a mere inhibition upon the company to charge rates exceeding a certain limit. If an irrevocable contract to govern for all time had been intended by either party, it can hardly be believed that such loose and indefinite language would have been used. The rates would have been made more specific, or, at least, they would have been made to apply to the entire road, and not limited to a haul between twenty and fifty miles. If a contract had been intended, it would have been expressed in the charter itself, and not by a mere reference to the maximum charges referred to in the charter of the different companies. That the intention was merely to make a regulation of the rates for the time being, then considered reasonable, is made more manifest when regard is had to the charter of the Lexington & Frankfort Railroad. It is evident that that railroad was intended to be run on the order of a toll turnpike. In reference to rates it speaks only of lump sums for a haul, without reference to distance. The provision is:

> "They shall have power to charge for tolls and the transportation of persons, goods, etc., . . . any sum not exceeding the following rates, to wit: For transporting, any distance, single packages weighing less than one hundred pounds, twenty-five cents, and at that rate, if such package weighs more than one hundred pounds."

Again, that charter not only fixes the maximum, but also the minimum of certain rates. It continues:

> "For transporting goods, produce, merchandise or property of any kind, not less than three and one-half mills, nor more than four mills, per hundred pounds' weight, per mile; for transporting passengers, not less than three and a half cents per mile, nor more than four cents per mile."

Then, after making a minimum charge, but no maximum charge, for coal, it proceeds to except divers and sundry articles from the rates established, and with reference to these excepted articles it reads:

> "The board of directors, or their agents, shall be, and they are hereby, authorized to contract specially for their transportation upon such terms as the parties interested may agree upon; provided, such rates shall in no case exceed 15 per cent over the rates allowed to be charged for heavy merchandise or produce."

We think it is evident, from these provisions, that the intention was merely to fix, as far as the rates were specified, a schedule of reasonable rates. If the parties intended a contract, we fail to see any reason why the state should have limited the railroad as to a minimum rate, or why the railroad should have desired such a limitation.

Again, if the parties understood they were contracting, then, with reference to the greatest part of the traffic, no rate whatever was fixed, but the railroad and its patrons were left to agree upon the rate. It is hardly intelligible that a contract of such moment would have been so loose and indefinite in its provisions. Again, if a contract was made, as contended by the road, fixing the maximum, so also was a contract made fixing the minimum rate to be charged by the road. According to the

allegations of the bill, the road has never charged even the minimum rate, but has continuously violated its contract in this regard, if it be a contract. If a contract, we fail to see upon what principle the railroad is privileged to violate or abandon such provisions as do not suit it, and yet compel the observance by the other party of such other provisions as it considers to its advantage. We think the abandonment by the company of the schedule of rates shows that it never understood or considered the provisions now relied upon to constitute an irrevocable contract. The alterations in the rates and subsequent regulations in reference thereto by the state show that the state never understood the matter now relied upon to be a contract.

We, therefore, contend that Section 18 did not make an irrevocable contract with the state which will preclude it to the end of time (the charter of the Louisville Company being perpetual) from preventing this railroad system, which is almost a monopoly in the state of Kentucky, exacting from the public extortionate rates and charges. If, however, such a contract was created by Section 18, we claim that it has been abandoned by the railroad.

In 1856, the state of Kentucky passed a general law providing that all charters and grants thereafter should be subject to alteration, amendment and repeal, as set forth in the appendix to this brief. After this general law, the Louisville Company received from the state of Kentucky numerous amendments to its charter enlarging its right and increasing its capital and affecting its rates. Under the charter of 1850, the capital of the company was $3,000,000. It has since grown to be $55,000,000. Under the charter of 1850, the company was to construct a line from Louisville to the Tennessee line, in the direction of Nashville, and embracing a railroad mileage of 139.88 miles, as stated in the bill of complaint. It has since constructed and purchased and now operates in Kentucky alone 1339.12 miles, and, in all,

3,000 miles. The population of Kentucky in 1850 was 982,405; in 1900 it was 2,147,174.

We have set forth in the appendix to this brief the provisions of the amendments of the charter of this company, which we think have a bearing upon the construction of its charter touching the matter now considered. It is our construction of these amendments that, even if Section 18 of the original charter created a contract touching its rates, it has since surrendered this contract by asking and receiving other privileges and submitting to be controlled by the state with reference to its schedule of rates; at least, they show that the state never supposed it was contracting away this important power. As all of these amendments were granted under the general provision saving to the state the right of alteration, amendment or appeal, the road can no longer claim an irrevocable contract. If the court, however, should construe the provision relied upon as still constituting an irrevocable contract, we submit that under the rules of strict interpretation adopted by this court touching such matters, it can have such contract only with regard to that line which it was authorized and empowered to construct under the charter creating the exemption, to wit, its main line from Louisville to the Tennessee line, in the direction of Nashville. This would not preclude the state from the exercise of its power to regulate the tariff of rates upon its other lines and branches in the state of Kentucky.

The Cincinnati Company claims a contract by virtue of the thirteenth and fourteenth section of an act approved February 13, 1872, which reads as follows (taken from the record of that case, pages 17, 18):

> "Section 13. The charge for transportation on said railway shall not exceed thirty-five cents per hundred pounds on heavy articles, and cents per cubic foot on articles of measurement, for every hundred miles, and four cents a mile for every passenger.

"Section 14. The taxes imposed on said line of railway and its appendages shall not exceed the rate imposed on other railroads within the state; provided, however, *that the trustees of the Cincinnati Southern Railway Company shall pay into the treasury of this Commonwealth an amount equal to fifty cents per capita for each through passenger across the Commonwealth of Kentucky, and twenty-five cents for each passenger for one hundred miles of travel on said road within the limits of the state of Kentucky; and the said trustees shall also pay semi-annually into the treasury of this Commonwealth an amount equal to one cent on each one hundred pounds of through freight shipped over said road*; and all payments due to the treasury under this act shall be made in the manner, and at such times, as may be established by the auditor of public accounts of this state, except the payments required by this act."

What we have heretofore said with reference to the Louisville Company, on the question as to whether such a provision does amount to a contract, applies with greater force to the provision just quoted.

The nineteenth section of the same act, however (R. 19), expressly provides against any contract feature. It reads as follows:

"Section 19. The General Assembly reserves the right to alter, amend or repeal this act, as provided in an act entitled, 'An act reserving power to amend or repeal charters and other laws,' approved February 14, 1856."

The company was relieved of the provisions of the fourteenth section, supra, by subsequent acts of the legislature, approved March 25, 1872, and February 4, 1893 (R. 20). Thus situated, we fail to see how the Cincinnati Company can claim an irrevocable contract fixing its rates.

Mr Tiedeman, in his recent work on State and Federal Control, says (page 980):

> "Where the charter of incorporation is taken subject to the reserved power to amend or repeal, the reserved power of amendment and repeal applies to this contract, that the corporation shall fix its own rates, as well as to any other rights and powers which might have been conferred by the charter."

That such a reservation, under a general law in existence at the time the charter is granted, or contained in the charter itself, leaves the state free to modify or change the rights or privileges granted, is no longer open to doubt.

> See Citizens Savings Bank v. Owensboro, 173 U. S. 636, and cases there cited.

For the operation of such a reserved power, as we understand it, it is not essential that a subsequent act or regulation should expressly repeal or amend the privilege previously granted. If there be an intent that the subsequent law should have a general operating force and apply equally to all persons throughout the state, this is sufficient, under the reserved power, to make it apply to corporations previously chartered, with special privileges that might conflict.

We do not think that there can be any serious doubt that the Act of March 10, 1900, was intended to apply to every railroad in the state. It says so in express terms. It seems, however, to have been the opinion of the circuit judge (R. Louisville Company, page 25), that some express repealing provision was necessary in order to make the act apply to the Louisville Company, even if the privilege granted did not amount to a contract.

Upon the whole case, therefore, we submit:

1. That the Act of March 10, 1900, is a valid exercise by the state of its police power in the regulation of the rates of railroad companies.

2. That no jurisdiction exists in the court to prevent the making of a rate, and that its jurisdiction can not be invoked until a rate has been made.

3. That neither the Louisville Company nor the Cincinnati Company is protected by an irrevocable contract touching its tariff of charges.

ROBERT J. BRECKINRIDGE, Atty. Gen. of Ky.
LEWIS MCQUOWN,
AARON KOHN,
ZACK PHELPS,
DAVID W. BAIRD,
Counsel for Appellants.

APPENDIX.

Constitution of Kentucky.

Railroad and Commerce.

Sec. 209. Railroad commission—number—qualifications—powers—election—term of office—removal of. A commission is hereby established, to be known as "The Railroad Commission," which shall be composed of three commissioners. During the session of the General Assembly, which convenes in December, eighteen hundred and ninety-one, and before the first day of June, eighteen hundred and ninety-two, the governor shall appoint, by and with the advice and consent of the Senate, said three commissioners, one from each Superior Court District, as now established, and said appointees shall take their office at the expiration of the terms of the present incumbents. The commissioners so appointed shall continue in office during the term of the present governor, and until their successors are elected and qualified. At the regular election in eighteen hundred and ninety-five, and every four years thereafter, the commissioners shall be elected, one in each Superior Court District, by the qualified voters thereof, at the same time and for the same term as the governor. No person shall be eligible to said office unless he be, at the time of his election, at least thirty years of age, a citizen of Kentucky two years, and a resident of the district from which he is chosen one year, next preceding his election. Any vacancy in this office shall be filled as provided in section one hundred and fifty-two of this Constitution. The General Assembly may, from time to time, change said districts so as to equalize the population thereof; and may, if deemed expedient, require that

the commissioners be all elected by the qualified voters of the state at large. And if so required, one commissioner shall be from each district. No person in the service of any railroad or common carrier company or corporation, or of any firm or association conducting business as a common carrier, or in anywise pecuniarily interested in such company, corporation, firm or association, or in the railroad business, or as a common carrier, shall hold such office. The powers and duties of the railroad commissioners shall be regulated by law; and until otherwise provided by law, the commission so created shall have the same powers and jurisdiction, perform the same duties, be subject to the same regulations, and receive the same compensation, as now conferred, prescribed and allowed by law to the existing railroad commissioners. The General Assembly may, for cause, address any of said commissioners out of office by similar proceedings as in the case of judges of the Court of Appeals; and the General Assembly shall enact laws to prevent the nonfeasance and misfeasance in office of said commissioners, and to impose proper penalties therefor.

Sec. 218. Penalty for charging more for short than long haul—power of commission. It shall be unlawful for any person or corporation, owning or operating a railroad in this state, or any common carrier, to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of property of like kind, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance; but this shall not be construed as authorizing any common carrier, or person or corporation, owning or operating a railroad in this state, to receive as great compensation for a shorter as for a longer distance: *Provided*, that upon application to the railroad commissioners, such common carrier, or person, or corporation, owning or operating a railroad in

this state, may, in special cases, after investigation by the commission, be authorized to charge less for longer than for shorter distances for the transportation of passengers or property; and the commission may, from time to time, prescribe the extent to which such common carrier, or person, or corporation, owning or operating a railroad in this state, may be relieved from the operations of this section.

General Laws of Kentucky, adopted April 5, 1893.

Sec. 821. Three commissioners — duties. There is established a department in the state government to be known as the railroad commission, which shall be composed of three commissioners, one of whom shall act as chairman, and whose duty it shall be to see that the laws relating to railroad, except street, are faithfully executed, and to exercise a general supervision over the railroads of the state. Each of said commissioners is authorized to administer oaths, and two of them shall constitute a quorum.

Sec. 822. Office at Frankfort—secretary—salary of commissioners and secretary. The office of the commission shall be at the seat of government, and they shall be provided with suitable offices, furniture and stationery by the state, and may appoint a secretary at a salary of twelve hundred dollars per year, which shall be paid by the state; each commissioner shall, before entering upon the duties of office, take an oath to discharge faithfully the duties of his office, and they shall each receive an annual salary of two thousand dollars, and their actual, necessary traveling expenses while engaged in the discharge of their duties, which, together with the salary of the secretary, shall be paid in the same manner as the salary of the governor, except that before any expenses are paid the chairman of the commission shall file with

the auditor an itemized statement of said expenses, signed by him and approved by the governor, which statement shall be filed before any warrants can be issued therefor.

Sec. 823. Election of in 1885 and every four years thereafter. At the regular election in 1895, and every four years thereafter, there shall be elected one commissioner from each of the districts hereafter designated, by the qualified voters thereof, who shall take his office on the fifth Tuesday next succeeding his election, and hold the same for four years, and until his successor is elected and qualified.

Section 824 states what counties shall compose each commission district.

Sec. 825. Report to be made by companies each year to commission—what it shall specify. Every railroad company shall, on or before the first day of September in each year, make and transmit to the commission, at its office in Frankfort, under oath of the president or manager of the company, a full and true statement of the affairs of said company as the same existed on the first day of the preceding July, specifying: (Then follows a long list of things touching which the railroad is to report.)

Sub-section 34, under Sec. 825:

34. Whether the freight or cars of such transportation companies are given any preference in fees or order of transportation; and, so, in that particular? The commission may propound any additional interrogatories, which shall be answered by such company in the same manner as those specified in the foregoing section; and the commission shall furnish to each company, in proper time, blanks upon which to answer the foregoing and such other questions as may be propounded.

Sec. 826. Freight for foreign points to be examined by commission—duty of commission. Said commission

shall examine all through freight rates from points out of *this state to points into this state; and whenever they find* that a through rate charge into or out of this state is excessive or unreasonable, or discriminating in its nature, they shall call the attention of the railroad officials in this state to the fact, and to urge them of the propriety of changing such freight. And when such rates are not changed, it shall be the duty of said commission to present the facts to the Interstate Commerce Commission, and appeal to it for relief; and they shall receive, upon application, the services of the attorney general of this state, and into the condition, management, and all other matters concerning the business of railroads in this state, so far as the same pertain to the relation of such railroads to the public, and whether such railroad corporation, their officers and employes, comply with the laws of the state; and whenever it shall come to their knowledge, or they shall have reason to believe, that the laws affecting railroad corporations in their business relations to the public have been violated, they shall prosecute, or cause to be prosecuted, the corporation or person guilty of such violation.

Sec. 827. Examination of officers and employes by commission—penalty for contempt. They shall have the power to examine, under oath, any person, or the directors, officers, agents and employes of any railroad corporation doing business in this state, concerning the management of its affairs, and to obtain information pursuant to this law; and shall have power to issue subpoenas for the attendance of witnesses, and to administer oaths; and any person who shall neglect or refuse to obey the process of subpoenas issued by said commission, or who, being in attendance, shall refuse to testify, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished for each offense by a fine of not less than fifty dollars, nor more than one hundred dollars,

or by imprisonment not less than ten nor more than fifty days, or both, in the discretion of the jury.

Sec. 828. Penalty for failing to make required reports or obstructing commission—jurisdiction of courts. Each officer, agent or employe failing or refusing to make, under oath, any report required by the commission, within the time required, or failing or refusing to answer fully, under oath, if required, any inquiry propounded by the commission, or who shall, in any way, hinder or obstruct the commission in the discharge of its duty, shall be guilty of a misdemeanor, and shall be fined for each offense not less than five hundred nor more than one thousand dollars; and it shall be the duty of the commission to prosecute the person offending; and the Franklin Circuit Court or the circuit court of any county through which the railroad runs, the officer, agent or employe of which has violated the provision of this section, shall have jurisdiction of such prosecution; and it shall be the duty of the Commonwealth's attorney to prosecute all indictments, actions and proceedings under this law.

Sec. 829. Complaints against companies—award of commission—proceedings upon. The commission shall hear and determine complaints under sections eight hundred and sixteen, eight hundred and seventeen and eight hundred and eighteen. Such complaints shall be made in writing, and they shall give the company complained of not less than ten days' notice of the time and place of the hearing of the same. They shall hear and reduce to writing all the evidence adduced by the parties, and render such award as may be proper. If the award of the commission be not satisfied within ten days after the same is rendered, the chairman shall file a copy of said award, and the evidence heard, in the office of the clerk of the circuit court of the county, which, under the Code of Practice, would have jurisdiction of said controversy, and the clerk of said court shall enter the same on the docket for trial; and summons shall be issued, as in other cases,

against the party against whom the award shall have been rendered, requiring said party to appear in the court, within the time allowed in ordinary cases, and show cause why said award shall not be satisfied. If such party fails to appear, judgment shall be rendered by default, and the same proceeding had thereon as in other ordinary cases. If a trial is demanded, the case shall be tried, in all respects, as other ordinary cases in which the same amount is involved, except that no evidence shall be introduced by either party except that heard by the commission, except such as the court shall be satisfied, by sworn testimony, could not have been produced before the commission by the exercise of reasonable diligence; the judgment and proceedings thereon shall be the same as in other ordinary cases.

Sec. 830. Improvements—when commission may order—notice and proceedings. Whenever, in the judgment of the commission, after a personal examination of the same, it shall appear that repairs are necessary upon any railroad, or when, from complaint made or their own knowledge, they shall have reason to believe that the tracks, bridges, tunnels or other structures of any company are in an unsafe or dangerous condition, or unfit for public travel, or that any additions to, improvements or changes in the stations or terminal facilities are needed for the convenience and security of the public, they shall give notice, in writing, to the company owning or operating such road, of the repairs, improvements or changes they deem proper and necessary, and shall afford such corporation an opportunity to be heard in reference thereto; and if the company shall neglect or refuse to make such repairs, improvements or changes within a reasonable time after such hearing, if a hearing is requested by the company, and the commission shall believe that such improvements or changes are proper and necessary after a hearing, if one is had, they shall lay the facts before the attorney general for his action, and shall

report the same fully to the next legislature; no examination, request, advice or report of the commission shall, in any way, affect the duties or obligations of said company or relieve it from any liability.

Sec. 831. Information obtained—when not to be made public. The commission shall not be required to give publicity to any contracts, leases or engagements obtained by them in their official capacity, if the interest of any company would thereby be injuriously affected, unless, in the judgment of the commission, the public interest requires it.

Sec. 832. Favors not to be accepted from companies by commissioners — penalty. The commissioners, nor either of them, shall, directly or indirectly, solicit or request from, or recommend to, any railroad company, or any officer, attorney, agent or employe thereof, the appointment of any person to any place or position, nor shall any company offer to them, or either of them, any place or appointment for themselves or other persons, nor shall they, or either of them, directly or indirectly, request, accept or receive any present, gift or gratuity of any kind, from any company. A violation of the provisions, or any of them, of this section shall subject the person or corporation so violating to a fine of not less than one thousand nor more than five thousand dollars, to be recovered by indictment as other penalties for violation of law are.

Sec. 833. Fees for copies of records. For a copy of any record on file in their office they shall charge and receive the same fees that are charged by the secretary of state for similar services, and shall cover into the state treasury any amount so received.

Sec. 834. Report of commission to be made annually and published. The commission shall annually, on the first day of December, make a report to the governor of all matters relating to their office for the preceding year, and such as will disclose the practical workings of the

railroads in this state, and such suggestions in relation thereto as they may deem necessary and proper, and shall have printed and lay before each legislature, within the first ten days of its session, five hundred copies of their reports for the preceding two years.

Sections 816, 817 and 818, referred to above, in Sec. 829, are as follows:

Sec. 816. Extortion—what is. If any railroad corporation shall charge, collect or receive more than a just and reasonable rate of toll or compensation for the transportation of passengers or freight in this state, or for the use of any railroad car upon its track, or upon any track it has control of, or the right to use in this state, it shall be guilty of extortion.

Sec. 817. Discrimination—what is. If any corporation engaged in operating a railroad in this state shall, directly or indirectly, by any special rate, rebate, drawback or other device, charge, demand, collect or receive from any person a greater or less compensation for any service rendered in the transportation of passengers or property than it charges, demands, collects or receives from any other person for doing for him a like and contemporaneous service in the transportation of a like kind of traffic, it shall be deemed guilty of unjust discrimination.

Sec. 818. Preference or advantage forbidden—rules defining same quantity of freight. It shall be unlawful for any corporation to make or give any undue or unreasonable preference or advantage to any particular person or locality, or any particular description of traffic, in any respect whatever, in the transportation of a like kind of traffic, or to subject any particular person, company, firm, corporation or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage. When one or more car loads of freight shall be transported at the same time for different persons, and for each shipper a car load or more, such shipment shall

be considered and taken as the same quantity of freight within the meaning of this law; and when less than a car load of freight, and over five thousand pounds, are transported at the same time for different shippers, and for each shipper over five thousand pounds, such shipment shall be considered and taken as the same quantity of freight; and when over five hundred pounds, and less than five thousand pounds, are transported at the same time for different shippers, and for each shipper said quantity of freight, such shipment shall be considered and taken as the same quantity of freight.

An act, approved February 14, 1856, reserving the right of alteration, amendment and repeal as to all charters and grants thereafter made.

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

Section 1. That all charters and grants of, or to corporations, or amendments thereof, and all other statutes, shall be subject to amendment or repeal at the will of the legislature, unless a contrary intent be therein plainly expressed: Provided, that whilst privileges and franchises so granted may be changed or repealed, no amendment or repeal shall impair other rights previously vested.

Sec. 2. That when any corporation shall expire or be dissolved, or its corporate rights and privileges shall cease by reason of a repeal of its charter or otherwise, and no different provision is made by law, all its works and property, and all debts payable to it, shall be subject to the payment of debts owing by it, and then to distribution among the members according to their respective interests; and such corporation may sue and be sued as before, for the purpose of settlement and distribution, as aforesaid.

Sec. 3. That the provisions of this act shall only apply to charters and acts of incorporation to be granted hereafter, and that this act shall take effect from its passage.

General Laws of Kentucky, previous to the Constitution of 1891.

An act in relation to common carriers, their agents and servants.

Section 1. Be it enacted by the General Assembly of the Commonwealth of Kentucky, that all persons and corporations doing business as common carriers in this Commonwealth, whose rates of freight and passage are limited by law, shall be required to print and post, and keep posted, in some conspicuous place in each office occupied by them for freight and passenger purposes, a tariff of the local and way freights charged upon all such articles as are usually transported by them, and of any changes which may, from time to time, be made in such rates; and also a list of the rates to which they are limited by law, and a plain reference to the dates of the passage of all laws by which such limitations are imposed; which tariff and lists shall be signed by the superintendent or other principal managing agent of the person or corporation in whose name they are published.

Sec. 2. That any common carrier mentioned in the first section, who shall fail to cause to be printed, posted, and kept posted, as required by the first section, the tariff and lists therein mentioned, shall be subject to a fine of fifty dollars for each month during which such failure shall continue; and any superintendent or managing agent, who shall knowingly and willfully cause to be printed and posted, as aforesaid, a false tariff of the rates charged, or of the rates to which such carriers are limited by law, shall be subject to a fine of five hundred dollars for each offense. The fines imposed by this section

shall be recoverable by indictment, in the name of the Commonwealth, in any court having jurisdiction of similar offenses.

Sec. 3. Any common carrier mentioned in the first section, who shall charge and demand from the consignee of any article transported by him a greater rate of freight than that to which such carrier is limited by law, shall forfeit all right to demand or receive from such consignee any price whatever for the transportation of such article; and the consignee in such case shall be entitled to demand and receive from the agent of such carrier, in whose possession or control it may be, the immediate delivery of the article upon which such overcharge is made, the consignee paying to the carrier only such charges, if any, as may have been advanced by him on such article.

Approved March 9, 1867.

An act to prevent the railroads of this Commonwealth from charging more than the rates allowed by law. (From Supplement, Revised Statutes of Kentucky, p. 743.)

Section 1. That if any railroad company in this Commonwealth shall charge more than the rates allowed by their charters for the conveying of freight, the said company shall forfeit and pay to the person so charged double the amount of the freight bill, and the party shall have his action therefor in any court of competent jurisdiction against the company.

Approved February 17, 1866.

Acts amending the charter of the L. & N. R. R. Co., and charters therein referred to, so far as they relate to rates.

An act to amend the charter of the Louisville & Nashville Railroad Company, approved January 17, 1856.

Sec. 2. That in addition to the foregoing sections, en-

acted by the state of Tennessee, and hereby enacted by the state of Kentucky, the following rights are vested and powers created, to be held and exercised by said company within the state of Kentucky: The said Louisville & Nashville Railroad Company are hereby vested with the power and authority to make agreements with any company or corporations incorporated by the laws of the state of Tennessee, to construct a railroad, in part or in whole, of the distance between Louisville and Memphis, and running in the direction of Louisville, whereby to secure mutual and reciprocal rights to the contracting parties, to run their respective roads through, from point to point, with or without change of cars or other machinery, and any other agreement which the parties may mutually make to facilitate trade and travel between the said cities of Louisville and Memphis. And the said Louisville & Nashville Railroad Company may, in arranging a tariff of tolls, make discrimination on such freight and travel as may run through from Louisville to Memphis, and from Memphis to Louisville, and such as may run in part on their road, and transhipped to another.

Sec. 3. That said company may, under the provisions of the thirteenth section of this act, from time to time, extend any branch road, and may purchase and hold any road constructed by another company, or *may agree on terms to receive the cars of other roads on their said road, but shall charge for the same the usual freight.*

An act to amend the charter of the Louisville & Nashville Railroad Company, approved February 6, 1858.

Sec. 6. That the Louisville & Nashville Railroad Company, for the main line and its branches, in making a tariff for freight and passengers, shall have the same authority that is vested in the Lexington and Frankfort, and Louisville and Frankfort Railroad Companies have by their charters and amendments thereto, and shall have

the right to plead and rely on the same limitation for the same causes of action provided for said railroad companies.

An act to amend the charter of the Louisville & Nashville Railroad Company, approved February 28, 1860.

Sec. 2. That said company may make arrangements with other companies for through freights and passage from distant points on such terms as they may agree from time to time.

Sec. 3. This act may be carried into effect, the provisions of any other act to the contrary notwithstanding; but it is not the meaning or intention of this act to empower the board of directors for said railroad to charge a higher rate of tariff on way freight and passengers than is now established by law.

An act to amend the charter of the Louisville & Nashville Railroad Company, approved January 8, 1864.

Section 1. Be it enacted by the General Assembly of the Commonwealth of Kentucky, that when the Louisville & Nashville Railroad Company shall have taken up the bonds loaned said company by the state of Tennessee, for the construction of that part of said road that is within the said state of Tennessee, the whole of the thirteenth and fourteenth sections of an act entitled, "An act to amend the charter of the Louisville & Nashville Railroad Company," approved January 17, 1856, except the first seven lines of said thirteenth section of said act, shall stand repealed; and thereafter there shall be no difference between the stock and debts of the main line and branches, nor shall separate books be required to be kept, and all stock issued shall be that of the "Louisville & Nashville Railroad Company." *Provided, however,* that this act shall first be accepted by the stockholders at some annual meeting.

Sec. 2. The holders of certificates of stock of the main line and branches may surrender the same and have them reissued as above directed.

Sec. 3. This act shall take effect from its passage.

An act for the benefit of the Louisville & Nashville Railroad Company, approved March 2, 1865.

Section 1. Be it enacted by the General Assembly of the Commonwealth of Kentucky, that the charter of the Louisville & Nashville Railroad Company be, and the same is hereby, amended so as to authorize said company to increase their rate of charges 25 per cent upon the amount they are now allowed by law to charge upon freight and passengers transported from Louisville to Nashville, or *vice versa: Provided*, nothing in this section shall authorize the company to increase their rate of charges upon way freight and passengers.

Sec. 2. This act shall take effect from its passage and continue in force five years.

An act to amend the act incorporating the Lexington & Ohio Railroad Company.

Sec. 2. That they shall be, and are hereby, permitted to charge for transportation of passengers, a distance of three miles and under, twelve and a half cents for each passenger: and for the transportation of produce and merchandise, and other articles paying by weight, when the distance is under five miles, they may charge the same compensation as though they transported five miles.

Approved December 22, 1831.

An act to amend the charter of the Frankfort & Louisville Railroad Company.

Sec. 2. All the rights, privileges and restrictions of the Lexington & Ohio Railroad Company, as they existed

under the charter of said company, from St. Clair street, in Frankfort, to the city of Louisville, except so far as they conflict with the charter of the Frankfort & Louisville Railroad Company, shall be, and they are hereby, revived and continued in full force, and transferred and covered, together with all the fee and right of way acquired and held by said company to the president and directors of the Frankfort & Louisville Railroad Company—provided, that this section shall not prohibit or interfere in any way with the right of the state of Kentucky, or her lessees, to extend the railroad now in use, or any other she may by law construct from Lexington to Frankfort, through Broadway street, in said town, to the river, or in any manner interfere with the rights and privileges granted by the state of Kentucky to the present lessees of the Lexington & Ohio Railroad, unless the written consent of the said lessees shall be first obtained.

Approved February 29, 1848.

An act to amend the charter of the Lexington & Frankfort Railroad Company, and Louisville & Frankfort Railroad Company.

Sec. 2. Be it enacted by the General Assembly of the Commonwealth of Kentucky, that so much of the twentieth section of the aforesaid recited act as limits the freight to be charged by said company for the transportation of goods, produce, merchandise or property, on their railway, be, and the same is hereby, repealed; and said company shall have power to charge for tolls and the transportation of goods, merchandise, produce or property of any kind whatsoever, transported by them along said railway, any sum not exceeding the following rates, viz.: For transporting single packages, any distance, weighing less than one hundred pounds, twenty-five cents, and at that rate if such package weighs more than one hundred pounds; for transporting goods, merchandise,

produce or property of any description, weighing over sixty-five pounds to the cubic foot, not more than four mills per hundred pounds per mile; for transporting any goods, merchandise or property, weighing more than forty-five pounds and less than sixty-five to the cubic foot, not exceeding 15 per cent over the rates allowed to be charged for heavy merchandise; for transporting any goods weighing more than twenty and less than forty-five pounds to the cubic foot, not exceeding 30 per cent over the same rates; and that in the transportation of goods, merchandise or property, weighing less than twenty pounds to the cubic foot, said company shall have the right to estimate each cubic foot as weighing twenty pounds, and to charge for the transportation of the same at the rates hereby fixed. Silver and gold bullion, money of all descriptions, and mails, are excepted from the rates herein established, and the board of directors, or their agents, shall be, and they are hereby, authorized to contract especially for their transportation upon such terms as the parties interested therein may agree upon.

Approved December 21, 1850.

An act to amend the charter of the Louisville & Frankfort Railroad Company, approved February 23, 1856.

Sec. 4. Be it enacted by the General Assembly of the Commonwealth of Kentucky, that said company shall have the same authority to charge for receiving, forwarding and storing packages consigned to them or their agents, or deposited in their warehouse or depots, or with their agents, for safekeeping, to be forwarded, as the Lexington & Frankfort Railroad Company has under the twentieth section of an act approved February 28, 1848.

Kentucky Statutes limiting railroad franchise to corporations.

Section 538. Any number of persons, not less than three, may associate to establish a corporation for the transaction of any lawful business, or to promote or conduct any legitimate object or purpose under the provisions of, and subject to the requirements of this article; but banking, building and loan, trust, insurance and railroad corporations shall, in addition to the provisions of this article, which are not inconsistent with the laws relating especially to them, be organized in the manner and subject to the provisions of such laws.

Sec. 539. Such persons shall execute articles of incorporation which shall specify:

(1) The name of the corporation, which shall be such as to distinguish it from any other corporation engaged in the same business, or promoting or carrying on the same objects or purposes in this state.

(2) The name of the city or town and county in which its principal office or place of business is to be located.

(3) The nature of the business, or objects or purposes proposed to be transacted, promoted or carried on.

(4) The amount of its capital stock, if any, and the number of shares into which the same shall be divided.

(5) The names and places of residence of each of its stockholders, and the number of shares of stock subscribed by each.

(6) The time when it is to commence, and the period it is to continue.

(7) By what officers or persons the affairs of the corporation are to be conducted, and the time and place at which they are to be elected.

(8) The highest amount of indebtedness or liability which the corporation may at any time incur.

(9) Whether the private property of the stockholders, not subject by the provisions of the law under which it is organized, shall be subject to the payment of corporate debts, and if so, to what extent.

Companies—Organization and Reorganization of.

Sec. 763. Corporators—number and powers—articles of incorporation—filing of—subscription per mile. Any number of persons, not less than seven, may associate to form a corporation for the purpose of constructing, operating and maintaining a railroad. Such persons shall execute articles of incorporation, which shall specify the name of the proposed railroad, the number of years the corporation is to continue, the amount of its capital stock, and the number of shares into which the same shall be divided; the number of directors, which shall not be less than five nor more than fifteen, and their names; the places from and to which, and the name of each county into or through which it is intended to be constructed, and its length as near as may be. Each subscriber to such articles shall set opposite his name his place of residence and the number of shares subscribed by him. Whenever two hundred and fifty dollars per mile has in good faith been subscribed, and twenty per cent thereof paid in in cash, to the persons named in the articles as directors, and an affidavit made to that effect by two of said named directors and attached thereto, a copy of said articles and affidavit shall be filed in the office of the Railroad Commissioners, and in the office of the Secretary of State; and when a certificate of such fact is delivered by the said officers to the incorporators, the persons who have subscribed such articles shall be a body-corporate by the name specified in the articles, and as such may sue and be sued, contract and be contracted with, have a seal, and change the same at pleasure; may

elect or appoint directors, who shall choose from their number such officers as may be necessary; may require from any officer or employe a bond for the faithful discharge of his duties, and prescribe such by-laws for its government, and exercise such powers as are necessary to the conduct of its business not inconsistent with law.

Sec. 562. If the franchise and property of any corporation is sold, the persons who may become the purchasers, at private sale or under the judgment of the court, may organize a corporation for the construction, operation and management of the same; and such corporation, when organized, shall have the same rights, privileges and franchises as have been granted to or acquired by the corporation purchased; and shall be subject to all the limitations, restrictions and liabilities imposed upon it; and, in addition thereto, shall be subject to all the provisions of this chapter. Such corporation shall be formed by articles of incorporation executed by the purchaser and his associates, and which shall, in addition to the requirements of Section five hundred and thirty-nine of this article, set forth a description of the property sold, and the decree under which the sale was made, if it was sold under a judgment, or if not, the deed conveying the property, the amount paid or to be paid, and to and by whom, and such other statements as may be deemed necessary. The articles shall be signed by the purchaser and his associates, if any, and a copy thereof recorded in the office of the Secretary of State; and if a railroad, in the office of the Railroad Commission; and when a certificate of such fact is delivered to the purchaser, the corporation shall be deemed to be organized, and shall have all the rights, powers and privileges, and be subject to all restrictions, limitations and liabilities of other similar corporations organized under this chapter.

FILED
JAN 10 1900

Supreme Court of the United States.

October Term, 1900.

Nos. 296, 297, 298, 299 and 300.

Charles C. McChord et al., Appellants,
vs.
Louisville & Nashville Railroad Co., Appellee.
And four other cases heard therewith.

SUPPLEMENTAL BRIEF FOR APPELLANTS.

ROBERT J. BRECKINRIDGE, Attorney General of Kentucky,
LEWIS McQUOWN,
AARON KOHN,
ZACK PHELPS,
DAVID W. BAIRD,
Counsel for Appellants.

Supreme Court of the United States.

OCTOBER TERM, 1900.

Nos. 396, 397, 398, 399 AND 400.

CHARLES C. McCHORD et al., Appellants,

vs.

LOUISVILLE & NASHVILLE RAILROAD CO., Appellees,

And four other cases heard therewith.

SUPPLEMENTAL BRIEF FOR APPELLANTS.

In our original brief we considered the questions which were raised in the Circuit Court and such questions, as far as we could anticipate them, that would be raised here. Until the oral argument, however, we were not apprised of the question which now seems to be urged and relied upon almost exclusively for the affirmance of these cases. In the preparation of our original brief, we had not seen the brief of the appellees, and the object of this supplemental brief is to consider the points urged in the oral argument. Condensed, the theory of the appellees now urged upon the court is that due process of law within the meaning of the Fourteenth Federal Amendment, in relation to the fixing of railroad rates, is the right to resort before the enforcement of the law, to a judicial inquiry as to the reasonableness of the rates by a bill in equity, and thus by one action to have a final determination of the question. They further contend that if this be not true, the act of March 10, 1900, deprives them of any inquiry or defense that is sufficient or adequate. The right to a

judicial hearing is considered fully in our original brief from pages 53 to 69, inclusive. It is therein set out upon the consideration and citation of numerous cases, that the railroad is not denied such a hearing, if the statute be silent on the subject, or if it do not expressly provide that the rate fixed by the Commission shall be conclusive. It is to be noted that in the case at bar, the statute expressly provides that the rate which the Commission is to fix shall be a just and reasonable rate. Independent of all other questions, the members of this court, who, in the case of Railroad vs. Minnesota, 134 U. S., considered that the fixing of a rate, or rather the rate after being fixed by the legislature, was binding upon the court, held that where the statute provides that the rate shall be reasonable, the courts are granted jurisdiction to investigate the subject; thus, Mr. Justice Bradley, in an opinion concurred in by Mr. Justice Gray and Mr. Justice Lamar, in that case said:

> "I hold that it is a legislative question, not a judicial one, unless the legislature or the law (which is the same thing) has made it judicial, by prescribing the rule that the charges shall be reasonable and leaving it there."

It results from this, together with other cases heretofore cited, that the Kentucky act, of March 10, 1900, did not contemplate excluding the court from inquiring as to the reasonableness of the rate, and therefore the legality of the law, when the Commissioners fixed the rate. It necessarily results, therefore, we submit, that under the Kentucky act the courts are given the right to grant the railroads this hearing. The only remaining question is as to whether a judicial hearing satisfies the mandate of due process, or whether the railroad is entitled to some peculiar kind of a hearing. The appellees contend for the latter proposition. It is our understanding of the adjudications of this court, that due process refers to functions and not to specific remedies. Thus, where according to the processes of common law, certain matters are enforced through legislative or administrative processes, due process is satisfied through the instrumentality of

these functions and the courts do not interfere therewith, and where judicial functions are required, it is sufficient that a day in court be granted. To hold that the railroads are entitled to any specific remedy, is, we think, to enlarge the operation of the Fourteenth Amendment and to read into due process limitations which have never heretofore been even intimated, and by virtue thereof grant to railroads an immunity and privilege, not of common right. It is sufficient to say, we think, that in the cases of Railroad vs. Wellman, 143 U. S.; Railroad vs. Gill, 156 U. S., and Fitts vs. McGhee, 172 U. S., together with other cases heretofore cited, that this court has held that due process with reference to the enforcement of rates, is satisfied, if the railroad have an opportunity to contest the validity of the law, either in defense of an indictment or a penal action. Each of those cases were of this nature. While the court, however, in those cases held that it was sufficient if the unconstitutionality of the rate could be shown, if it were unreasonable, and therefore unconstitutional in defense of the indictmnet or the actions, it does not appear in what way this defense was made. We think, however, it is clear that such a defense presents a pure question of law and is therefore, as suggested by Mr. Justice White, at the oral argument, justicial. It is well established that making the rate is legislative; that the rate when made, is a law and must be obeyed as such, unless, like other laws, it invades some constitutional provision, to wit: The Fourteenth Amendment, in not being reasonable. The indictment, as suggested, would charge that the railroad had violated the law in exacting a rate in excess of the rate made. The only question of fact for the jury to find would be whether or not an excess had been charged. If the railroad desired to raise the question as to the legality of the law, it could do so, either by demurrer or special plea. It is wholly indifferent to the present consideration, what the procedure would be. As yet no such question has ever arisen in the State courts of Kentucky. Regardless, however, of the procedure that the question is one of law, results from the fact that the issue pre-

sented is as to the constitutionality of the law under which the indictment is found. The question, therefore, at issue is, "Is there any law for the indictment?" This is purely justicial and is to be tried by the court, and not to be submitted to a jury. It is to be tried in advance of the submission of any question to the jury and must be settled by the court, and the rate found to be reasonable, before the jury acts on the question as to whether the rate has been exceeded. This, we think, answers every criticism of the appellees and is sound. Of course it remains, like every other question submitted to human tribunals, that different judges, as different juries, might disagree. But all of these questions could be appealed to the Supreme Court of the State, where, so far as the State is concerned, a uniform result could be moulded; and if not there, by writ of error, cases could be brought here, as stated in the case of Fitts vs. McGhee, 172 U. S. There is no room, therefore, for the contention that the railroads might be turned over to the caprice of a jury and different findings had by different juries, nor is there any room for the contention that the case of Louisville and Nashville vs. Commonwealth, 99th Kentucky, so much relied upon, has any bearing upon the question of what constitutes extortion, after the rate has been made. That the question under the Kentucky practice is justicial, is, we think, certain, from the following provisions of the Code of Practice: Criminal Code, Section 180:

> "Issues of law shall be tried by the court. Issues of fact in prosecutions for offenses, of which the punishment is limited to a fine of $16, shall be tried by the court. All other issues of fact shall be tried by a jury."

Section 181:

> "An issue of law arises on a demurrer to the indictment."

Section 182:

> "An issue of fact arises upon a plea of not guilty or of former acquittal or conviction."

Section 235:

> "All questions of law *arising during the trial* shall be decided by the court and the jury shall be bound to take the decision of the court on points of law as the law of the case."

Section 238:

> "If there be a reasonable doubt of the defendant being proven to be guilty, he is entitled to an acquittal."

Section 271 provides that even upon the trial of a fact by the jury, a new trial may be awarded by the court for numerous grounds stated, among them: if the verdict be against the law or the evidence, or if the defendant had not had a fair and impartial trial.

Again, by Section 287, even upon a trial of question of fact by the jury, cause against the rendition of a judgment may be shown upon any ground that would be a cause for a new trial.

By Section 347, appeals to the Court of Appeals are allowed in all cases where the judgment is for a fine exceeding $50.

Section 175 provides:

> "The plea of not guilty is a denial of every material allegation in the indictment, and all matters of fact tending to establish a defense, other than former conviction or acquittal, may be given in evidence under it."

In such prosecutions as those provided by the Act of March 10, 1900, the defendant is not arrested, but under Sections 147 and 148, Criminal Code, is summoned, like defendants in civil actions, the offense, under Section 7 of the Criminal Code, being a mere misdemeanor. We think it necessarily results from these code provisions, that under the State practice, the question of the constitutionality of the law (the reasonableness of the rate being the same thing) would be a question of law to be tried by the court and with which the jury would have no concern. This must be the case, because of the fact, as repeatedly decided by this court, in the cases cited in the original brief, under the

head of jurisdiction, that the burden of proof to show the rate to be unreasonable, and therefore to invalidate the law which the railroad impugns and declares to be invalid, is upon the railroad, and this it must show affirmatively and by evidence which excludes all reasonable doubt on the subject. Whereas, upon a trial before a jury, under the State practice, every presumption is indulged in favor of the defendant, and its guilt must be proved, as well as every fact tending to show it, to the exclusion of a reasonable doubt. If the question were one for the jury's consideration, on a plea of the unconstitutionality of the act, the burden would be on the Commonwealth to prove, to the exclusion of a reasonable doubt, that the rate fixed is a reasonable rate. Of this we do not think the railroad could justly complain, and as a matter of fact, might be in a better position than it occupies, with reference to the burden of proof, by decisions of this court in this regard. The fact that in the trial of the question of law raised, to wit: the validity of the law of the indictment, requires the hearing of evidence by the court, does not change the issue from one of law to one of fact. In a great many questions of law, the court is required to hear evidence. This often occurs, even during the trial of a case before a jury. Thus, in Bishop's new Criminal Procedure, Vol. 1, Sec. 763, sub-section 3, it is said:

> "It (demurrer) is a submission to the court of the claim that assuming the facts alleged by the other party to be true, they do not in law sustain that for which they are put forth."

Again in Section 989, sub-section 1:

> "Necessity is a part of the law of the land, supreme within its sphere. There are facts upon which, if the court does not pass, it can not discharge its function; therefore, it decides them, thus."

In sub-section 2, he refers to the trial of facts, or rather the hearing of evidence by the court upon questions relating to the competency of witnesses. This, the author says "often involves

an inquiry of fact, and when it does, the judge alone settles it, the jury taking no part therein and having no power to revise his findings."

In sub-section 3 numerous other illustrations are referred to, among them the mental capacity of infants, the competency of experts, whether a confession was voluntary and whether a foreign law is or is not proved.

"The judge alone," says the author, "hears evidence (on these matters) and passes on the fact and not even need the jury be present."

If, however, we should be mistaken in this position, the fact remains that, under the act the railroad has its day in court, as the act can be enforced only through judicial process, and thus, as said in Fitts vs. McGhee, 172 U. S., the cases can finally be brought for review to this court. Such also was the decision in Railroad vs. Wellman, 143 U. S. and Railroad vs. Gill, 156 U. S. Neither of these opportunities, however, seem to satisfy the appellees' contention. We submit, however, that one fact concerning the appellees' contention should control these cases, and that is, if the court has jurisdiction before a rate is made to enjoin the legislative function of making the rate, a fortiori, would it have jurisdiction after the rate has been made and when the subject-matter becomes one of judicial inquiry, either by mandatory injunction or by mandamus against the Railroad Commissioners, to try the reasonableness of the rate, and therefore the constitutionality of the law in one action for the entire State? If so, the criticisms of the appellees are satisfied. The same facts and reasons which give jurisdiction now, would give jurisdiction then. If, under Section 821, Kentucky statutes, referred to in our original brief, and printed in full, on page 143, by which the Commissioners are required to see that the laws relating to the railroads are faithfully executed and to exercise a general supervision over them, puts the Commissioners into that touch and connection with the rate law referred to in Fitts vs. McGhee, 172 U. S., as gives the courts jurisdiction of them, in this case, before

the rate is made, then for stronger reasons the court would have jurisdiction to enjoin the rate, if it be unreasonable, or in all events, to inquire into its reasonableness, after it is made. In fact, if there be that connection, it is our belief that the court has such jurisdiction after the rate is made, though it has not before the rate is made; for the essential reason that the subject-matter, to wit: the making of the rate, being legislative, is not within the jurisdiction of the court, whereas the reasonableness of the rate, or its constitutionality, which is the same thing, is within the jurisdiction of the court. Or, in other words, is a matter into which the court has a right to inquire. Furthermore, if there be that connection of the Commissioners with the law, by virtue of Section 821, that the court has jurisdiction of them in relation to the rate laws, then we believe that there can be no question that both mandatory injunction and mandamus would lie after the rate is made. It is to be borne in mind that under the act of March 10, 1900, the Commissioners are not only required to make a reasonable rate, but to keep it reasonable or empowered, and in fact compelled (because may means shall) to revoke an unreasonable rate, if they shall have made one, or to revoke a reasonable rate, if it subsequently becomes unreasonable. This is a continuing duty. By Sections 475 and 477, Kentucky Civil Code, the court, upon a writ of mandamus, is to decide all questions of law or fact, and the writ is thus defined: "The writ of mandamus, as treated of in this chapter, is an order of a court of competent and original jurisdiction commanding an executive or ministerial officer to perform an act or omit to do an act, the performance or omission of which is enjoined by law. * * *"

It has been decided by the Supreme Court of the State, that the writ lies against a judicial officer, to compel him to act, but not to control his judgment. 18 B. Mon. 423; 82 Ky. 632; 83 Ky. 66; 85 Ky. 177. It also lies to compel officers or a public corporation to act in a specified manner as to matters concerning which they have no discretion. For instance, to compel a city

to repair street (3d Met. 494; 13th Bush 334), or to compel city authorities to levy a tax to pay an ascertained debt (11th B. Mon. 154; 18 B. Mon. 852; 2d Met. 64; 3d Bush 144; 84 Ky. 36). It lies to compel the auditor of the State to draw his warrant for a debt due from the Commonwealth (13 B. Mon. 150; 80th Ky. 336; 86th Ky. 23). It lies to compel a county court or judge to qualify a sheriff or jailor (4 Met. 236; 2 Duv. 243; 83 Ky. 451).

Under the Act of March 10, 1900, the Board of Commissioners have a discretion and judgment with reference to what rate shall be made, provided that at all times it be reasonable, and to have a discretion as to whether any shall be made, but they have no power to make an unreasonable rate, and it is their duty to revoke such, if it should be made. All these questions, however, we submit, arise after the rate has been made. Whether the process be injunction or mandamus, the question comes to the same thing, to wit: The revoking or cancellation of the unconstitutional rate. This is the extent of judicial interference, as repeatedly said by this court, especially in case of Reagan vs. Railroad, 154 U. S., and Smyth vs. Ames, 169 U. S. We therefore submit to the court that the fears of the appellees are wholly without foundation, and that if anything, the Kentucky Act is an improvement upon other acts, because it does not convert the Commission, who performs the legislative function, into public prosecutors and thus array them in antagonism to the railroads.

CONTRACT.

In the case of Ruggles vs. Railroad, 108 U. S., cited in our original brief, considerable weight was given by Mr. Chief Justice Waite, in finding the matters relied upon as not constituting a contract, to the fact that one section of the charter provided that the by-laws should not conflict with the constitution, laws of the State, or of the United States. Such a provision is found in the charter of the Louisville Company, as Section 12 of the Act of March 5, 1850, which reads as follows:

"Section 12 of an act approved March 5, 1850, chartering the Louisville and Nashville Railroad Company.

"Be it further enacted, That the said president and directors, or a majority of them, may appoint all such officers, agents, or servants, as they may deem expedient for the business of the company, and they may remove any of them at pleasure; that they, or a majority of them, may determine, by contract, the pay of such officers, agents and servants, and regulate, by by-laws, the manner of adjusting all accounts against the company; that they shall have power to erect warehouses, work-shops, depots, and all other buildings necessary for the transaction of the business of the company; that they shall have power to direct and regulate in what manner, and by what evidence, stock in said company may be transferred; and to pass all by-laws which they may deem necessary or proper for exercising the powers hereby vested in said company, and for carrying into effect this act Provided, the same shall not be contrary to the laws of the United States or of this State."

We set this out in order that the court may consider it in the light of the reasoning of the case supra. It is committed from the appendix of our original brief. In this connection, we desire to call the attention of the court to the fact, that by an oversight, or mistake, the counsel for the Louisville Company have not correctly copied into their brief the charter provision relied upon as constituting a contract, in the case of Ruggles vs. Illinois, 108 U. S. They must have copied from some other contract. Not a single one of the essential provisions relied upon in that case is set out in that brief. The court will find the charter provision correctly copied in our original brief, page 117.

The contention that the act of March 10, 1900, does not affect the rates of the Louisville Company in the absence of a provision expressly repealing its charter provisions touching its rates, is settled, we think, in our favor by the case of Louisville and Nashville Road vs. Commonwealth, 161 U. S., 677. In that case a contract was claimed by the Louisville Company, to

purchase parallel roads by virtue of a provision in its charter and that Section 201 of the Constitution of Kentucky, subsequently adopted, did not repeal its charter, even if it did not have an irrevocable contract with the State. Section 201 of the Constitution of Kentucky, reads as follows:

> "No railroad, telegraph, telephone, bridge or common carrier company shall consolidate its capital stock, franchises or property, or pool its earnings in whole or in part with any other railroad, telegraph or telephone, bridge or common carrier company, owning a parallel or competing line or structure; or acquire by purchase, lease or otherwise, any parallel or competing line or structure or operate the same; nor shall any railroad company, or other common carrier, combine or make any contract with the owners of any vessel that leaves or makes port in this State, or with any common carrier by which combination or contract, the earnings of the one doing the carrying are to be shared by the other not doing the carrying."

In passing upon this contention, this court in the case supra said:

> "* * * However broad the power of the Louisville and Nashville Company, under its charter of 1856, we are still confronted with the proposition that the proposed consolidation of these two railway systems is a clear violation of Section 201 of the Constitution, which forbids the consolidation of the stock, franchises, or property, as well as the purchase and lease of parallel and competing lines. Unless this section impairs the obligation of the contract contained in the charter, it operates as a repeal of any power that may possibly be deduced from such charter to purchase, lease or consolidate with any parallel or competing line."

The object of the constitutional provision, under consideration there, was a police regulation; the same is true of the Act of March 10, 1900, under consideration here. The regulation, by the provision of the act, is intended to be general, and words of repeal need not be included.

We respectfully submit that the judgment of the trial court in these actions should be reversed.

ROBERT J. BRECKINRIDGE,
Attorney-General of Kentucky.
LEWIS McQUOWN,
AARON KOHN,
ZACK PHELPS,
DAVID W. BAIRD,
Counsel for Appellants.

CONTENTS.

	PAGE
CAUSE OF ACTION,	3
UNREASONABLE RATE MAY BE ENJOINED,	10
FEARS,	16
PRACTICE,	18
CONTRACT,	29
APPENDIX,	31

Supreme Court of the United States.

OCTOBER TERM, 1901.

Nos. 396, 397, 398, 399, and 400.

CHARLES C. MCCHORD, ET AL., - *Appellants*,

VERSUS

LOUISVILLE & NASHVILLE RAILROAD COMPANY, AND FOUR OTHER CASES HEARD THEREWITH, - - - - - - - - *Appellees.*

Additional Brief for Appellants.

In view of the fact that the Court has ordered a re-argument of these cases, we take the liberty of extending our original brief and of replying to the main contentions relied upon by the appellants in their briefs and urged by them at the first oral argument.

It is to be borne in mind that the law, the validity of which is now assailed, has never been tested in any of the courts of Kentucky. As yet it is wholly untried, and we are therefore without any guide or precedent from decisions of the Kentucky courts as to whether there is any foundation for the fears indulged by appellees.

In our original brief we argue the proposition that the Court is without jurisdiction to entertain this suit because of the relaship of the Board of Railroad Commissioners to the enforcement of the rate law. In our first brief we contend that if the Rail-

road Commission has not such a relationship as devolves upon it the duty of enforcing the rate after it is made, then the Commissioners are not amenable to judicial process, under the rule laid down in Fitts v. McGhee, 172 U. S. 516.

We set out in our original brief and in the appendix the provisions of the law which bring the Commission in touch with the enforcement of the laws, and we now in this brief desire to present more at large those duties, to the end that this Court may determine whether or not the Board of Commissioners has such duties to perform with reference to the law after the rate shall have been made as will make them amenable to a suit in equity to enjoin the enforcement of the rate if an unreasonable rate should be made. We also in this brief enlarge our argument on the question of practice that is raised by the appellees as being the main ground upon which they assail the validity of the Kentucky rate law.

As we understand the argument of the appellees' counsel, their right to maintain these suits arises from their contention that if an unreasonable rate be made, they would be wholly without judicial redress. If, therefore, either by injunction or mandamus, the reasonableness of the rate can be tested, or if, by plea to an indictment, the question can be raised as one of law, there is an end to the appellees' fears.

We shall present our enlargement of these views in their order.

The Bills State no Cause of Action.

The bills in these cases are substantially the same. Each assails the law of March 10, 1900, upon the ground that the fixing of rates by the Commission will deprive each of them of its property without due process of law; that in fixing rates, the Commission will exercise judicial power, try and convict appellees

of extortion, and, as a punishment for the offense, lower their rates and deprive them altogether of the rate-making power. Notwithstanding the able arguments submitted in support of this contention, the bills are really without merit. Neither the substantive facts averred, nor the just inferences deducible from them, tend to show that the Commission has already trenched upon, or, if unrestrained, will in future overstep the limitations of the Constitution, State or Federal.

In the argument and briefs of counsel, it is conceded that the making of rates is "an admittedly legislative duty." In numerous cases decided by this Court and cited in the original brief, it has been held that this duty may be delegated to a commission, and that there is no distinction between the exercise of the function directly by the legislature, or mediately through a commission. Indeed, Mr. Justice Brewer, in Chicago & N. W. R'y Co. v. Day, 35 Fed. 875, seemed to be of opinion that the exercise of the power through the commission was preferable. In that case he said:

> "The reasonableness of a rate changes with the changed condition of circumstances. That which would be fair and reasonable to-day, six months or a year hence may be either too high or too low. The legislature convenes only at stated periods; in this State once in two years. *Justice will be more likely done if this power of fixing rates is vested in a body of continual session, than if left with one meeting only at stated and long intervals.* Such a power can change rates at any time, and thus meet the changing conditions of circumstances." (Italics ours.)

Notwithstanding the principles thus announced, the contention in all the bills is, that the commission, under the law of March, 1900, will, in the exercise of judicial power, try and convict the appellees of extortion, and inflict a lower rate, by way of punishment, and thus deprive them of property without due process of law.

It is respectfully submitted that this construction of the law is unwarranted, and that there is no averment of facts, in either bill, to support the inferences sought to be drawn by counsel.

The purpose of the law-makers is clear, and expressed in unambiguous terms. There is no unusual or extraordinary power conferred. The law seems to follow the lines laid down by Mr. Justice Brewer. It is averred in all the bills, and no doubt was so claimed pending the passage of the law of March, 1900, that the appellees were only charging just and reasonable rates. Doubtless some members of the legislature believed this to be true. For this reason, no doubt, the law did not arbitrarily require the commission to make a schedule of rates for all the roads at once, but rather provided for an investigation of the truth of the claims of appellees, as to the justice of their rates. In order that this might be done, it is provided that if the commission shall receive information, or complaint shall be made to it, that any company is charging or collecting extortionate rates, it shall hear and determine the matter (after notice to the company affected) upon evidence and argument of the parties. If such hearing develops the fact that the rates are reasonable, the commission can not interfere with the company complained against; but if, upon the other hand, it is ascertained that the rates are extortionate—or to use the words of the statute, if it is determined that the company has been "guilty of extortion"—then the commission is directed and empowered to "fix a just and reasonable rate, toll, or compensation, which said railroad company or corporation may charge, collect, or receive for like services thereafter rendered." Ten days after the schedule thus fixed is delivered to the offending company, it becomes the standard for its changes, and a failure to conform to the rates thus fixed is punished by fine. If changing conditions require it, the commission has power thereafter to modify or revoke the rate.

Counsel in argument proceed, however, upon the assumption that this investigation or hearing which takes place involves the exercise of judicial power, and that it is a trial which is followed by judgment, pains, and penalties. This is an erroneous view.

Mr. Justice McKenna (then Circuit Judge), in an elaborate opinion in Southern Pac. Co. v. Board of Railroad Com'rs, 78 Fed. 260, in discussing this question, said:

> "The commission undoubtedly exercises a function which the legislature would otherwise exercise. It should be as full with the commission as with the legislature, and in both subject to the same judicial investigation, as we have already seen it is, *and thereby giving to the railroads that protection to their rights and property which the Constitution guarantees.*" (Italics ours.)

Mr. Justice Bradley, in Railroad v. Minnesota, 134 U. S. 418, concurring in the view of the majority of the courts as to the delegation of the rate-making power to a commission, said:

> "I think it perfectly clear and well settled by the decisions of this Court that the legislature might have fixed the rates in question. If it had done so, it would have done it through the aid of committees appointed to investigate the subject, to acquire information, to cite parties, to get all the facts before them, and, finally, to decide and report. No one could have said that this was not due process of law. *And if the legislature itself could do this, acting by its committees and proceeding according to the usual forms adopted by such bodies, I can see no good reason why it might not delegate the duty to a board of commissioners,* charged as the board in this case was, to regulate and fix the charges, so as to be equal and reasonable. Such a board would have at its command all the means of getting at the truth and ascertaining the reasonableness of fares and freights, which a legislative committee has. It might or it might not swear witnesses and examine parties. Its duties being of an administrative character, it would have the widest scope for examination and inquiry. All means of knowledge and information would be at its command, just as they would be at the command of the legislature which created it. *Such a body, though not a court, is a proper tribunal for the duties imposed upon it.*" (Italics ours.)

Nothing can add to this clear and explicit statement of the reason of the rule which has been approved by this Court. Instead of the rate fixed by the commission being a judgment, establishing guilt and inflicting penalties, it is simply a law establishing rates made after full and satisfactory investigation. If it should be violated, penalties may follow—not because the rate has been fixed, but because, as in the case of other penal statutes, the rule established by law has been disregarded. Placing the apple in the Garden of Eden did not bring "death into the world and all our woe." The penalty came as the result of the violated commandment.

In this connection the attention of the Court is called to the case of Louisville & Nashville R. R. Co. v. Commonwealth, 99 Ky. 132, relied upon by appellees to sustain their contention upon this point.

There the railroad company was indicted for extortion under this statute:

> "If any railroad corporation shall charge, collect, or receive more than a just and reasonable rate of toll or compensation for the transporation of passengers or freight in this State, or the use of any railroad car upon its track or upon any track it has control of, or has the right to use, in this State, it shall be guilty of extortion." (§ 816, Ky. Stat.)

The only point decided in that case was that this statute was *void for uncertainty*. The court said:

> "There is no standard whatever fixed by the statute, or attempted to be fixed, by which the carrier may regulate its conduct; and it seems clear to us to be utterly repugnant to our system of laws to punish a person for an act the criminality of which depends not on any standard erected by the law, which may be known in advance, but on one erected by a jury. And especially so as that standard must be as variable and uncertain as the views of different juries may suggest, and as to which nothing can be known until after the commission of the crime."

It will be perceived that this case can have no application here. Under the statute in question each jury erected its own standard of reasonableness. Without any possible means of knowing what that standard would be, the railroad company might violate it. After the act the rule was declared, in the varying opinion of juries, and punishment inflicted for its violation. The law under which punishment was adjudged, in the case just cited, was left by the legislature in such an uncertain state that it was impossible to tell what rule the offender would be judged by. On the other hand, the act of March, 1900, directs the commission to establish and publish a specific rate, which *shall be the standard*. The penalties denounced by this law can not be inflicted until this standard is established by the commission and *known to the company*. Under the one law punishment might be visited upon the company for violating an unknown and uncertain rule; under the other this can not be.

The argument now made against the supposed act of the commission could be made against any law enacted by the legislature fixing rates. Precisely the same results alleged to be apprehended from the act of the commission might be averred to follow the adoption of rates by the legislature; the rate-making power would be taken from appellees without notice or hearing, their charges lowered, and severe penalties inflicted upon the corporations and their employes if the law should be disregarded. Such an argument would be futile if made against a law enacted by the legislature. To use the words of Mr. Justice Bradley, "No one could say that this was not due process of law." There being no distinction between the exercise of the rate-making function directly by the legislature and mediately through a commission, it must follow that appellees' objections here are unavailing. It can not do indirectly that which it could not do directly. If the legislature has power to make a schedule of

rates, it must follow that the commission may do so within the limitations prescribed by this Court. The rate may be made by either legislature or commission, subject alone to judicial review as to reasonableness.

Has the Kentucky Commission a Duty to Enforce the Rate After it is Made?

The action of the commission being, in law, the act of the legislature by deputation merely, an injunction will not be granted to restrain the exercise of the function to make rates, because this would be an interference with the legislative power of the State.

In the case of New Orleans Water Works Company v. New Orleans, 164 U. S. 471, Mr. Justice Harlan, in a learned opinion, announced this general rule.

The rule was applied and considered by Mr. Justice Field, upon the circuit, in Alpers v. San Francisco, 32 Fed. 503. The complainant there sought an injunction to permit the passage of an ordinance which would impair the obligation of a contract existing with the city by which he had the right to remove and appropriate the bodies of dead animals. After stating the general rule, Mr. Justice Field said:

> "This no one will question as applied to the power of the legislature of the State. The suggestion of any such jurisdiction of the Court over that body would not be entertained for a moment. The same exemption from judicial interference applies to *all legislative bodies, so far as their legislative discretion extends.* . . . The courts can not, in the one case, forbid the passage of a law, nor in the other, the passage of a resolution, order, or ordinance. If by either body, the legislature or the board of supervisors, an unconstitutional act be passed, *its enforcement may be arrested. The parties seeking to execute the invalid act can be reached by the courts,* while the legislative body of the

> State, or of the municipality, in the exercise of its legislative discretion, is beyond their jurisdiction. The fact that in either case the legislative act threatened may be in disregard of *constitutional restraints, and impair the obligation of a contract, as alleged in this case, does not affect the question. It is legislative discretion which is exercised, and that discretion, whether rightfully or wrongfully exercised, is not subject to interference by the judiciary.*" (Italics ours.)

Here the bills charge that the commission is about to proceed to fix rates; that is, to exercise the legislative function with which the State has invested it. There can be no difference in the passage of an ordinance by a city council and the adoption of a schedule of rates by the commission under the act of March, 1900. Each exercises legislative power by delegation from the State, and each is invested with a legislative discretion. When a municipality enacts an ordinance it becomes a law of the State, operative within its limits. When a commission makes a schedule of rates, it becomes the law of the State, as effective as if enacted by the legislature. Having the unquestioned right to proceed to make rates, it is submitted that the courts have no jurisdiction to restrain the exercise of this power by the commission, even if its act will beget a multiplicity of suits, impair the obligation of contract alleged to exist in favor of certain of the complainants, or reduce their rates below the point where a reasonable return for the investment can be received. The remedy, in such a state of case, is clearly stated by Mr. Justice Harlan in the New Orleans Water Works case, already cited (164 U. S. 471), as follows:

> "We repeat that when the city council shall pass an ordinance that infringes the right of the plaintiff, and is unconstitutional and void as impairing the obligation of its contract with the State, it will be time enough for equity to interfere and by injunction prevent the execution of such ordinance. If the ordinances already passed are in derogation of the plaintiff's contract rights, their enforcement can

be prevented by appropriate proceedings instituted directly against the parties who seek to have the benefit of them. This may involve the plaintiff in a multiplicity of actions, but that circumstance can not justify any such decree as it asks."

But it is earnestly contended by counsel for appellees, that after the rate is made there is no forum in which the execution of the law may be arrested and the question of the reasonableness of the rates determined, once for all. It is insisted that after the rate is made, and the companies notified, the act of the commission becomes a law to be enforced in the criminal courts by fines and penalties, and consequently injunction will not lie. In this view counsel for appellees are probably in error. At all events, we desire here to submit the question fairly for the decision of this Court.

The commission was created by § 209 of the Constitution of Kentucky. It was therein declared that

> "The powers and duties of the railroad commission shall be regulated by law; and until otherwise provided by law, the commission so created *shall have the same powers and jurisdiction, perform the same duties,* be subject to the same regulations, and receive the same compensation as is now conferred, prescribed, and allowed by law to the existing railroad commissioners."

At the time of the adoption of the Constitution, the law (now § 816, Ky. Stat.) denouncing a penalty for charging more than a just or reasonable rate was in force; and the law (now § 819, Ky. Stat.) was also in force which provided for prosecution by indictment for violation of the law against extortion, only on the request of the railroad commission "filed in the court having jurisdiction of the offense," or by action in the name of the Commonwealth, "upon information filed by the railroad commissioners."

§§ 816 and 819, Ky. Stat., have never been repealed.

By § 218 of the Constitution of Kentucky, it was declared to be unlawful for common carriers to charge a greater compensation for a shorter than a longer distance, under substantially similar circumstances. By this same section it was provided, however,

> " . . . that upon application to the railroad commissioners, such common carrier, or person, or corporation, owning or operating a railroad in this State, may, in special cases, after investigation by the commissioners, be authorized to charge less for longer than for shorter distances for the transportation of persons or property; and the commission may, from time to time, prescribe the extent to which such common carrier, or person, or corporation, owning or operating a railroad in this State, may be relieved from the operation of this section."

By § 821, Ky. Stats., it is provided that

> "There is established a department in the State government to be known as the railroad commission, which shall be composed of three commissioners, one of whom shall act as chairman, *and whose duty it shall be to see that the laws relating to railroads, except street, are faithfully executed, and to exercise a general supervision over the railroads of the State.*"

By § 825 the railroads were required annually to transmit to the commission a full statement of their affairs in answer to interrogatories, which the commission was authorized to propound. By § 827 the commission was authorized to examine, under oath, any of the officials or employes of a railroad "concerning the management of its affairs, and to obtain information pursuant to this law"; and in aid of this power they were authorized to compel the attendance of witnesses, under a penalty of a fine of from fifty to one hundred dollars, or imprisonment not less than ten nor more than fifty days, or both, in the discretion of the jury.

By § 829 the commission was authorized to hear and determine various enumerated complaints against railroads, and by

§ 830 were authorized to inspect the tracks, bridges, tunnels, or other structures of railroads, and if found to be in an unsafe or dangerous condition, require them to be repaired. (See appellants' original brief, pp. 141–147, for laws here referred to except § 819, Ky. Stat., which is printed as appendix to this brief.)

It thus appears that the commission was given general supervision over the railroads of the State, and charged with the enforcement of the laws relating thereto. As a part of this duty it was required to enforce the law against any railroad company which should, by charging "more than a just and reasonable rate" denounced by § 816, Ky. Statutes, be guilty of extortion.

The Court in Louisville & Nashville Railroad Co. v. Commonwealth, 99 Ky. 132, held that § 816 was not enforceable, because *a reasonable rate was not fixed therein.* The law of March 10, 1900, gives to the commission authority to make the rate, and when this shall have been done, what was uncertain will be fixed and certain.

After making the rate under the act of March 10, 1900, it may be the *duty of the commission to enforce the same,* under the provisions of § 819, either by indictment or action. Consequently, after the rate is made, if it be an unreasonable one, injunction will lie against the commission to prevent the enforcement of the law. If so, the Court can then determine, once for all, whether the rate is reasonable. If unreasonable, the commission may be restrained from enforcing it and left free to make another.

In the case of the Southern Pac. Co. (78 Fed. 236), already referred to, it was contended that after the rate was made by the commission it became a law with which it had no further concern, and consequently injunction would not lie against the commission to test the reasonableness of the rates. The power of the commission, in reference to the enforcement of rates, was conferred by the law of California in the following words:

> "Said commissioners shall have the power, and it shall be their duty, to establish rates of charges for the transportation of passengers and freight by railroad and other transportation companies, . . . and enforce their decisions and correct abuses through the medium of the courts."

This law, which was quoted in the opinion of Mr. Justice McKenna, provided, in substance, that after the rate was made by the commission a copy should be served upon the corporation affected thereby, and twenty days thereafter the rate should take effect. The bill was filed before the twenty days had expired. The Court held that it was the duty of the commissioners to enforce the rate, and that for this course injunction would lie. In discussing this point, Mr. Justice McKenna said:

> "That this construction will make the board more efficient there can be no doubt, and I am not disposed to interpret any ambiguity so as to take away a valuable power, and one so consistent with, and, may be, necessary to, the purposes for which the commission was created."

It is submitted that the connection of the commission with the enforcement of the rate, under the laws of Kentucky, is more intimate than in California. By the Constitution of the State (§ 218), the commission is authorized to suspend, upon investigation, its provision as to the long and short haul, thus, in effect, exercising the rate-making power; and by § 819, Ky. Stat., the commission is directly charged with the enforcement of the laws of the State against railroads, which *charge unreasonable rates.* If a schedule should be made under the law of March, 1900, fixing unreasonable rates, it would probably be the duty of the commission, under the provisions of § 819, as well as under § 821, *to enforce that schedule by causing indictments to be returned or actions to be instituted.* If so, injunction will lie against the commission to stay the enforcement of the law, in order that the reasonableness of the rates after they are made may be deter-

mined. If such remedy be open to the appellees, they virtually concede that their present bills in advance of the making of the rate are not maintainable. One thing, we submit, is certain, and that is, if the commission can be enjoined before it makes the rate, *a fortiori* can it after the rate is made, and it would seem that the courts would allow it to perform its legislative function and interfere only when the constitutional limitation of a reasonable rate is passed.

Injunction Does Not Lie on the Ground of Mere Fears.

Aside from the considerations already presented, the general rules of equity procedure will not warrant interference here by injunction. The danger sought to be relieved against lies altogether in apprehension. The only *fact* alleged in reference to the action of the commissioners is that they have requested copies of appellees' schedules. Upon this single fact rests all the allegations as to the character of rates which the commission will make.

The commission is charged with the sole duty of making just and reasonable rates. Every presumption must be indulged in favor of honesty and fairness. The bills do not assail the commission on this ground. Must it be conclusively presumed that because the unreasoning fears of appellees have found exaggerated expression in the averments of the bills, that a confiscatory rate is about to be established? Will not the Court rather, in the absence of averments of fact, give effect to the presumption of the law?

The danger at most is problematic. It is possible, but can the Court say it is probable? In such a state of case Judge Taft said:

> "We think the danger must be shown to be probable, and not merely possible, where the remedy by injunction is sought."
>
> Lake Erie & W. R. Co. v. Fremont, 92 Fed. 735.

The case of South. Pac. Co. v. Board of Railroad Com'rs, 78 Fed. 236, is strongly illustrative of this point. There the railroad commission had made an order reducing the grain rates of the company eight per cent. Another order was entered upon its record declaring that its general charges were twenty-five per cent too high, and resolving that "this board *proceed at once to adopt a revised schedule of rates in accordance herewith*, in order that the same may be in force on or before January 1, 1896." (Italics ours.)

The Court in that case enjoiped the enforcement of the eight per cent reduction, which had already been made, but refused the injunction as to the twenty-five per cent reduction which had been resolved upon. The ground of the refusal rests upon the fact that no decisive action had been taken, and the resolution had not been embodied in a schedule.

How much stronger is that case than this? There the opinion was expressed by the commission as to the amount of reduction to be made, and a resolution adopted pledging itself *at once* to make the schedule. If this was not adequate ground for reasonable apprehension of injury, can it be said that the mere request of the commission to be furnished with appellees' schedules will suffice?

In Ryan v. Williams, 100 Fed. 172, apprehended injury, as ground for injunction, was discussed. The injunction was sought by a minority stockholder to prevent the consolidation with another company, or any steps being taken to that end, in anticipation of the passage of a law by the State legislature to authorize such consolidation. The injunction was refused. The Judge said:

> "To grant an injunction in anticipation of a possible injury to arise under a law that may never be passed, is, to say the least, unusual. What complainant's rights may be and what relief should be afforded him in the event of the passage of such a law as he contemplates, can not now be anticipated."

In Erie Railway Co. v. Erie & W. V. Railroad Co., 100 Fed. 808, an injunction was sought to restrain the building of a proposed railroad upon the ground that if built it would be used in violation of a contract with complainant. In refusing the injunction, the Judge said:

> "I do not think the ground is sufficient to support the order that the Court is now asked to make. The injunction prayed for is directed, not against a diversion of traffic, but against the construction of a railroad, the allegation being that the defendant *may or will put the road to an unlawful use.*" (Italics ours.)

These and many other cases which might be cited are only declaratory of the general rule that the bill for injunction should directly state the facts which show the existence of the apprehended danger, and not merely inferences which do not necessarily flow from the allegations.

Spell. Ex. Relief, §§ 410, 982.

Practice.

In our supplemental brief filed after the first argument we contend that the validity of any rate which might be fixed by the Kentucky Commission under the act of March 10, 1900, in an indictment against any railroad for a violation of the rate is a question of law to be decided by the Court, though, for that decision, the Court would be required to hear evidence or refer the matter to a commissioner. A more thorough investigation of this question has convinced us that this position is sound. We are not to be understood, however, as conceding that an investigation of the question, as a question of fact, even by a jury, would violate any constitutional right of the railroads affected. That the constitutionality of the rate is a question of fair law is evident, we think, from the fact that any procedure

that might be taken by way of demurrer or plea to the indictment to question the rate would impugn the validity of the law.

As we have heretofore shown, the fact that the rate is made by a commission does not render the rate, when thus made, any the less a law than were it made directly by the legislature in the statute. The validity of the rate is, therefore, the validity of a law, and this is always a pure question of law, even though, like the existence of a law, it might entail the investigation of or inquire into a condition of fact.

In the case of Town of South Ottawa v. Perkins, 94 U. S. 260, involving the question as to whether or not a law of the State of Illinois had been passed in the manner required by the Constitution of that State, thus requiring an investigation of the records and journals of the legislature, Mr. Justice Bradley, in delivering the opinion of the Court, said:

> "And whether it be a law or not a law is a judicial question to be settled and determined by the courts and judges."

And again, in answer to a petition to reform, he said:

> "We also hold the existence of a law to be a judicial question to be decided by the court, though framed in form as an issue of fact. It follows that the court below on re-trying the case must itself be satisfied whether the law in question was or was not constitutionally passed, and the vote entered on the journals, and instruct the jury accordingly. The evidence or means of ascertaining this fact must be such as is legally applicable to such a case according to the laws of Illinois. But, strictly speaking, the issue is more properly referable to a court than to a jury. That it may be so framed the judgment will be amended directing the court below to award in each case a *venire de novo*, or to allow the parties to amend their pleadings, as they shall be advised, in order to refer the trial of the issue to the court instead of the jury."

Upon a similar question, in the case of Post v. Board of Supervisors of Kendall County, 105 U. S. 667, Mr. Justice Gray, in delivering the opinion of the Court, said:

> "Whether a seeming act of a legislature is or is not a law is a judicial question to be determined by the Court, and not a question of fact to be tried by a jury."

In Gardner v. Barney, 6 Wall. 499, upon a similar question, Mr. Justice Miller, in delivering the opinion of the Court, said:

> "We are of opinion, therefore, on principle as well as authority, that whenever a question arises in a court of law of the existence of a statute, or of the time when a statute took effect, or of the precise terms of a statute, the judges who are called upon to decide it have a right to resort to any source of information which in its nature is capable of conveying to the judicial mind a clear and satisfactory answer to such questions, always seeking first for that which in its nature is most appropriate, unless the positive law has enacted a different rule."

In the case of Board of Commissioners of Wilkes County v. Coler, 180 U. S., p. 506, involving a similar question, Mr. Justice Harlan, in delivering the opinion of the Court, after approving the rule laid down in South Ottawa v. Perkins, 94 U. S. 260, said:

> "In our judgment it was not necessary to have raised an issue on the subject, except by demurrer to the declaration. The Court is bound to know the law without taking the advice of a jury on the subject."

To the same effect as the above authorities are:

Thompson on Trials, Volume 1, Section 1053.
Cooley on Constitutional Limitations (6th ed.), 162, 163.
A. & E. Ency. of Law (first ed.), 634, 639, 645.

In the last authority, on page 639, it is said:

> "The constitutionality of laws or ordinances is a question exclusively for the court. The validity of the regulations and by-laws of a corporation is to be determined by the

court, and to submit such a question to the jury is improper. Moreover, whether a given custom is valid or invalid is always a question of law for the court, and should not be left to the jury."

And on page 645 of that work it is said:

"Thus, the reasonableness of the rules of a board of trade, or of the rules, regulations, ordinances, or by-laws of a corporation, is a question for the court. So, whether fines, customs, or services are reasonable or not is a question for the court to decide."

A great number of authorities is cited in the notes to support the text.

In the case of Lyons v. Woods, 153 U. S. 663, Mr. Chief Justice Fuller, speaking for the Court, said:

"The question whether a seeming act of a legislature has become a law in accordance with the fundamental law is a judicial one to be tested by the courts and judges, and not a question of fact to be tried by a jury."

In Nesbit v. People, 19 Col. 450, 36 Pac. 224, the Supreme Court of Colorado lays down the rule thus:

"Every court must determine for itself what the law is upon a given subject, whenever it becomes necessary to apply the same in the discharge of its judicial functions. It is a matter of every-day experience that the court must decide what the common law is, and what the construction of statutes shall be. So, also, the court must decide as to the existence or validity of a statute whenever the same is in dispute; and, as a general rule, the same principle applies to a dispute respecting the existence or non-existence of constitutional provisions. Such dispute may become a question of fact; yet the court must determine it, and, in doing so, may resort to other evidences than the Session Laws of the State published by authority. It may seem paradoxical, but it is nevertheless true, that a question of fact respecting the existence or non-existence of a law is a question of law. It is a question to be determined by the court whenever it arises in the course of litigation, and not a question to be referred to some other tribunal for decision."

The case of State v. Searcy, 39 Mo. App., was a prosecution under a local-option law applicable to Greene County, outside of the city of Springfield, for the unlawful sale of intoxicating liquors. The defendant was convicted, and on appeal no question was made as to the propriety of the conviction, provided the statute known as the Local Option Law was properly shown to have been in force by a valid election at the time and place when and where the alleged offense was committed. On page 406 of the opinion it is said:

> "The court refused an instruction submitting to the jury the question whether the local option law had been adopted in Greene County, outside of the city of Springfield, and advising them that in order to find that it had been so adopted they must find that every element and fact necessary to constitute the establishment of it had been proved by the State. The court was right in refusing to give this instruction. The question whether a law which is to be a rule of conduct exists or does not exist is a judicial question, and can not be submitted to the ignorance or caprice of a jury. Thus it has been held that the question whether what purports to be an act of the legislature of the State was duly passed with the concurrence of the requisite majority of the members of both houses, as is required by the Constitution of the State, so as to become a valid law, is a question for the court and not the jury. (South Ottawa v. Perkins, 94 U. S. 260; Port v. Supervisors, 105 U. S. 667.) So it has been held that the existence of a city ordinance is to be proved by evidence addressed to the court and not to the jury. (Rouls v. Valcour, 58 N. H. 437; Hall v. Costello, 48 N. H. 176, 179.) This is merely a branch of the general principle that the judge decides questions of law and the jury questions of fact. (Co. Litt. 155, 156; Foster's Crown Law, 255, 256; Fougate v. Carter, 6 Mo. 267, 273; Hickey v. Ryan, 15 Mo. 62, 67.) This duty is none the less incumbent on the judge from the fact that in performing it he may be required to pass on questions of fact. . . . The court, therefore, rightly withheld the question from the jury."

To the same effect see the cases of

Comstock v. Tracy, 46 Fed. 170;
Creager v. Hooper, 83 Md. 504; 35 Atl. 161;
Jones v. United States, 137 U. S. 216.

We submit that if the judge, and not the jury, is to determine the question of the validity of a law which is assailed on the ground that the constitutional method of its enactment has not been pursued, so also should the judge, and not the jury, determine the validity of a law which is assailed on the ground that the legislature or other enacting body has no power to make it. If the invalidity of a law because of the means of its adoption is a question of law, *a fortiori* is it a question of law when its validity is assailed on the ground that it is not within the power of the State to enact.

While it is true that the invalidity of a law because of its violation of some constitutional principle generally appears on the face of the statute, yet it is also true that in some cases its invalidity depends upon the existence or non-existence of certain facts, and when this is the case the question to be decided is, nevertheless, a question of law. Of this kind would be an inquiry into the constitutionality of the law fixing a cruel and unusual punishment for the commission of a crime, and where the cruel character of the punishment could be ascertained only through evidence. In the cases involving the electrocution law of New York, the Supreme Court and the Court of Appeals of New York held that evidence could not be introduced to assail the validity of the law fixing the punishment on the ground that it was cruel, yet it is perfectly patent from those decisions, as well as from the consideration of the case on writ of error to this Court, that had such an investigation into the facts been admissible, the inquiry would have been one for the Court and not for a jury, as it involved only a question of law. The fact that the

invalidity of an act may appear from matters not apparent on its face does not operate to change the inquiry from one of law into one of fact, or transfer the decision of the question from the judge to the jury. Whether the invalidity appears upon the face of the act or from matters *de hors* the act, the inquiry is the same, to wit, its constitutionality, and this must ever remain a question of law.

The cases involving the electrocution law of New York, above referred to, are

People *ex rel.* Kemmler v. Durston, 55 Hun, 64.
Same case on appeal, 119 N. Y. 569.

On writ of habeas corpus it was complained that the law under which Kemmler was convicted violated that provision of the constitution prohibiting cruel and unusual punishments. The same question was raised by the defendant in defense of the indictment.

People v. Kemmler, 119 N. Y. 580.

In these cases an application for a writ of error to this Court was made from the judgment denying the writ of habeas corpus, and appears in the reports as

Ex parte Kemmler, 136 U. S. 436.

The New York courts held that the infraction of the constitutional provision prohibiting cruel and unusual punishments must appear on the face of the law, and that where this did not appear it was not competent for the court to hear evidence. It was not clear whether the court intended this as a general rule or only to apply to the peculiar features of that case, where the law itself showed that the legislature had gone to great extremes in investigating the question with a view of mitigating the pain

and suffering attending the death penalty. It clearly results, however, from the reasoning of this case, in the New York Reports, and from the opinion of this court delivered by Mr. Chief Justice Fuller, denying the writ of error, that had it been competent to make an issue calling for evidence as to whether or not the punishment was cruel and unusual, that issue would have been one of law, to be tried by the Court, and not an issue of fact to be tried by a jury.

Somewhat of a similar nature is the question which was before the Supreme Court of Maine in the case of State v. Wagner, 61 Me. 178. In that case a murder was committed on Smutty Nose Island, and the question raised was whether or not that island was within the County of York, in which the indictment was found. This issue required an investigation of facts, and the defendant attempted to have it submitted to the decision of the jury, but it was ruled by the Court that the question was one of law, to be decided by the Court, though requiring an investigation into facts. In that case, on page 184 of the opinion, it is said:

> "Under this condition of things, the presiding judge assumed to decide the question as one of law for the Court; and therein we think he did right. Neither the construction of charters or grants, nor the effect of previous acts of jurisdiction, as shown by records, can be a matter for the jury to determine. The force and effect of charters, grants, and records are for the Court. Wherever the question of jurisdiction depends on their construction and effect, it is purely a question of law for the Court. . . . Obviously, under such circumstances, there is nothing for a jury to pass upon, and a party charged with crime can not claim under any form of pleading to have such a question submitted to the jury for determination, nor complain if his request that it should be so submitted is overruled. Such a request is merely one of those stumbling-blocks in the way of justice which it is the business of the Court to remove."

And again, on page 185:

> "Even in the absence of distinct legislative recognition as part of our own State and of a particular county in it, we think questions whether the numerous islands along our coast lie within our borders and within county lines, and are subject to the jurisdiction of our courts are properly questions for the decision of the Court, and, once settled, must be deemed settled forever, and not subject to the varying verdicts of successive juries whenever a person charged with crime sees fit to claim to throw in a denial of jurisdiction as a make-weight to raise a doubt in a case otherwise clear. A criminal might as well call for the opinion of the jury upon the regularity of the judge's commission or the validity of the election of the Governor by whom he was appointed."

In Gard v. Callord, 6 Maule & Selwyn's Rep. 69, it was held that the reasonableness of a custom as to the amount of toll was a question of law to be decided by the Court, and not a question of fact to be decided by the jury. That was an action upon the case, in which the plaintiff declared upon a custom that all inhabitants within the borough of Modbury brewing in their houses any ale or beer for sale ought to grind at his mills in the borough of Modbury all the malt used by them and to pay him a certain toll. It was objected at the trial that the custom was unreasonable and void because the toll was excessive, but it was ruled by the judges that the question, whether reasonable or not, was a question for the Court, and not for the jury. On motion for a new trial it was contended that

> "Though in many instances it might be for the Court to determine as to what should be deemed reasonable, yet in the particular objected to it was otherwise, because the proportion of toll which was reasonable to be taken depended on a variety of circumstances and could not be judged of in the abstract, and therefore the price was a question for the jury alone."

In opposition to this, it was contended that

"In every case, whether reasonable or not, must in some degree depend on the facts, yet this does not preclude the Court from judging on that question as reasonableness of time, notice, etc."

In reply it was contended that

"Where the question was whether the toll was reasonable in its kind, there it might rest with the Court to decide, but where the question was only as to its quantum, the jury ought to determine it, under all the circumstances."

It will thus be seen that the question here at bar was fairly before the Court. The notes of the case give the decision of the judges thus:

"They (the judges) quote 2 Inst. 222, that what shall be deemed in law to be reasonable shall be judged, all circumstances considered, by the judges of the law, if it come judicially before them."

In Illinois Central Railroad v. Whittemore, 43 Ill. 420, 92 Am. Dec. 138, the Supreme Court of Illinois, in holding that the question as to whether a railroad regulation be reasonable is always a question of law to be decided by the Court, say:

"The Circuit Court left it to the jury to say whether the rule was reasonable. This was error. It was proper to admit testimony, as was done, but, either with or without this testimony, it was for the court to say whether the regulation was reasonable and therefore obligatory upon the passengers. The necessity of holding this to be a question of law, and therefore within the province of the court to settle, is apparent from the consideration that it is only by so holding that fixed and permanent regulations can be established. If this question is to be left to juries, one rule would be applied by them to-day and another to-morrow. In one trial a railroad would be held liable, and in another presenting the same questions, not liable. Neither the companies nor passengers would know their rights or their obligations. A fixed system for the control of the vast interests connected with railways would be impossible, while such a system is essential equally to the road and to the public."

The ruling of this case is approved and followed in South Florida Railroad v. Rhodes, 25 Fla. 40, 23 Am. St. Rep. 506.

In Elliott on Railroads, Volume I, §202, the rule is stated thus:

> "The reasonableness of such regulations and of the manner of their enforcement in a given case has been held by some of the courts to be a question of fact for the jury. But it would seem that this must be a question of law for the court to decide if any fixed and permanent regulations are to be established, and the better authority holds it to be such, since one jury in a given case might pronounce the rule reasonable, while another jury in another case might decide the same rule to be unreasonable."

A great number of authorities is cited to support the text. In Wood on Railroads, Volume 2, §297, page 1198, the rule is stated thus:

> "Whether or not any particular regulation is reasonable depends not only upon its intrinsic character but upon the circumstances in which it is attempted to be enforced. There are some authorities, therefore, which hold that the question of reasonableness in this connection is one for the jury. But it is believed that this is not the better doctrine; authority and principle are both strongly in favor of the rule that such a question is one for the Court. Under any other view of the rule there could be no uniformity in the conclusions reached; one jury might declare a regulation unreasonable, and a succeeding one immediately declare it to be reasonable. Moreover, it is not always possible that juries can be made aware of the reasons which call for the regulation. The weight of authority, therefore, decidedly favors the rule that it is for the Court to determine the reasonableness of any regulation."

In the case at bar, after the Kentucky commission shall have made a rate, the question of the reasonableness of that rate or its constitutionality will become a pure question of law; and we think this question can be raised, as said by Mr. Justice Harlan in the Coler case, cited *supra*, by a demurrer to the indictment.

The defense of the railroad, if it exceed the rate fixed, to such an indictment will be that the rate is unlawful, and not that it has not violated the rate as made.

Contract.

Since the filing of our previous briefs in this case, this Court has affirmed the Supreme Court of the State of Illinois in the following cases, which are referred to in our original brief as supporting our contention that the charter granted to the Louisville & Nashville Railroad Company by the State of Kentucky does not amount to an inviolable contract in the matter of fixing maximum rates:

Freeport Water Company v. City of Freeport, 180 U. S., p. 587;

Danville Water Company v. City of Danville, 180 U. S., p. 619;

Rogers Park Water Company v. Fergus, 180 U. S., p. 624.

The question is there elaborately considered, and a great number of authorities are cited.

Since the first argument of these cases Judge Brannon, of the Supreme Court of West Virginia, has published a book entitled "The Fourteenth Amendment." Upon a consideration of the cases bearing on the police power of the States with reference to controlling rates, he concludes that this power can not be bartered away by contract; that it is necessary to sovereignty. (See pp. 192, 369.)

In our supplemental brief, hurriedly printed after the first argument, we wrongfully accuse the counsel of the Louisville company of error in their brief in copying the charter provisions

relied upon as constituting a contract in the case of Ruggles v. Illinois, 108 U. S.

We take this opportunity of withdrawing that charge and of confessing the error to be ours.

ROBERT J. BRECKINRIDGE,
Attorney-General of Kentucky.

LEWIS MCQUOWN,
AARON KOHN,
DAVID W. BAIRD,
Counsel for Appellants.

APPENDIX.

§ 819, Ky. Stat.

Any railroad corporation that shall be guilty of extortion or unjust discrimination, or of giving to any person or locality, or to any description of traffic, an undue or unreasonable preference or advantage, shall, upon conviction, be fined for the first offense in any sum not less than five hundred dollars nor more than one thousand dollars; and, upon a second conviction, in any sum not less than five hundred dollars nor more than two thousand dollars; and, upon a third conviction, in any sum not less than two thousand dollars nor more than five thousand dollars. The circuit court of any county into or through which the line of railroad may run, owned or operated by the corporation alleged to be guilty as aforesaid, and the Franklin circuit court shall have jurisdiction of the offense, which shall be prosecuted by indictment, or by action in the name of the Commonwealth, upon information filed by the Board of Railroad Commissioners; and such railroad corporation shall also be liable in damages to the party aggrieved to the amount of damages sustained, together with cost of suit and reasonable attorneys' fees, to be fixed by the court. Indictments under this section shall be made only upon the recommendation or request of the Railroad Commission, filed in the court having jurisdiction of the offense; and all prosecutions and actions under this law shall be commenced within two years after the offense shall have been committed, or the cause of action shall have accrued.